SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 528

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH

No. 529

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL.

No. 530

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, ET AL.

No. 531

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, ET AL.

No. 532

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, ET AL.

679355—46——1

No. 533

THE UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, PETITIONER
v.
ABRAHAM COLE HYATT, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 In United States Circuit Court of Appeals Fourth District

APPENDIX TO BRIEF FOR APPELLANT

SECTION A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, ASHEVILLE DIVISION

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

Judgment

Filed March 17, 1945

This case came on to be heard on the allegations of the petition to condemn, the allegations of the answer filed on behalf of the respondent, and evidence taken in open court.

The Court, having duly considered the same, is of the opinion that the objections offered by the respondent to the right to condemn the lands, as set out in the answer, are well taken and are sustained.

It is therefore ordered, adjudged, and decreed that the objections to the right to condemn, and the prayers contained in the answer for dismissal of petition, be, and the same are, hereby sustained.

It is further ordered, adjudged, and decreed that the order of taking made and entered by this Court on March 23, 1944,
2 be and the same is hereby modified to the extent that the Authority shall not, after this date, exercise the right of possession or control over any of the lands of Tract No. FR–1092 belonging to respondent except such of said lands as are below the level of the reservoir.

It is further ordered, adjudged, and decreed that S. Columbus Welch may execute and deliver forthwith to the Authority or to the United States of America a deed, with full covenants of warranty, conveying all of the lands contained in the description of said tract No. FR–1092 located and lying below said reservoir. The description in said deed shall cover all the land owned by the respondent which is to be submerged by water impounded by the Fontana Dam.

It is further ordered, adjudged, and decreed that S. Columbus Welch, upon the payment to him by petitioner of the sum of $300.00, shall forthwith make, execute, and deliver to the Authority a deed, with full covenants of warranty, conveying to the United States or to the Authority an undivided one-half fee simple interest in and to the lands described in tract FR-141 as set out by metes and bounds in the petition filed in this cause.

And it is further ordered, adjudged, and decreed that S. Columbus Welch, respondent, shall forthwith execute and deliver to the petitioner herein a deed of release, releasing, acquitting, and discharging Tennessee Valley Authority, its successors and assigns, and its agents and employees; the United States of America;
the State of North Carolina; the State Highway and Public
3 Works Commission of North Carolina; and Swain County, North Carolina; of and from all obligations, liabilities, claims, and damages of every nature, character, or description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience or injury resulting to the lands owned by respondent and designated in the petition as tract No. FR-1092, as fully described by metes and bounds in said petition, and to any other lands owned by respondent within the reservoir area of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from, or to be in any way connected with the construction of said Fontana Dam or the creation or operation of Fontana reservoir, including but not limited to:

(a) The loss, destruction, and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the said State of North Carolina and all its political subdivisions;

(b) Loss, damage, impairment, interference, or injury to the property described in the petition, forever releasing the State of North Carolina and any of its political subdivisions from furnishing or providing any roads or means of access whatever to any of said lands owned by respondent described and set out in the petition filed herein.

It is ordered, adjudged, and decreed that S. Columbus Welch, respondent, his heirs, assigns, executors, or administrators,
4 upon notice or demand forthwith execute and deliver unto the State of North Carolina and/or the United States Department of the Interior a deed for a right of way over any of the lands of respondent referred to as tract No. FR-1092, for the construction and maintenance of a road or highway through and

over any of said lands, said right of way to be and include such width as the said State of North Carolina, and/or United States Department of the Interior is acquiring and using through and over adjacent lands for said road purposes, with the right on the part of the State and/or United States Department of the Interior to restrict the use of said road or highway from commercial traffic; and said land of respondent, S. Columbus Welch, is burdened with the future possibility of said easement.

March 16, 1945.

E. Y. WEBB,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

Judgment

Filed March 17, 1945

This case came on to be heard on the allegations of the
5 petition to condemn, the allegations of the answer filed on behalf of the respondents, and the evidence taken in open court.

The Court, having duly considered the same, is of the opinion that the objections to the right to condemn, as set out in the answer, are well taken and should be sustained.

It is therefore ordered, adjudged, and decreed that the said objections to the right to condemn, and the prayers contained in the answer for the dismissal of the petition, be and the same are hereby sustained.

It is further ordered, adjudged, and decreed, by consent of the respondents, that John Burns and Julia Burns will not require either the Authority, the State of North Carolina, or Swain County, to build or maintain any access road or roads to the lands embraced in tract FR-19, designated in the petition filed in this cause, by reason of the covering or flooding of Highway 288. It is adjudged that the respondents, John Burns and wife, Julia Burns, shall have no cause against either the Authority, the State

of North Carolina, or Swain County, by reason of the flooding by the Authority of Highway 288.

March 16, 1945.

E. Y. Webb,
U. S. District Judge.

6 In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 526

United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, petitioner

v.

Fred Lollis, respondent

Judgment

Filed March 17, 1945

This cause coming on to be heard upon the petition filed [by] the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the respondent, Fred Lollis, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that petitioner is not authorized and empowered, under the Acts of Congress creating the Tennessee Valley Authority, to condemn the lands described in its petition, for the reasons set forth in my Findings of Fact and Conclusions of Law and Memorandum Opinion.

It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court dated 24 day of May 1944, signed on the ex parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley
7 Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. Webb,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, RESPONDENT

Judgment

Filed March 16, 1945

This cause coming on to be heard before me upon the petition filed by the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the respondent, Arnold E. Bradshaw, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that the petitioner is not authorized and empowered under the Acts of Congress creating the Tennessee Valley Authority to condemn the lands described in its petition, for the reasons set forth in my Findings of Fact and Conclusions of Law and Memorandum Opinion.

8 It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court dated 24 day of May 1944, signed on the ex parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, RESPONDENT

Judgment

Filed March 16, 1945

This cause coming on to be heard upon the petition filed by the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the
9 respondent, Philip G. Rust, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that the petitioner is not authorized and empowered under the Acts of Congress creating the Tennessee Valley Authority to condemn the lands described in its petition, for the reasons set forth in the Findings of Fact and Conclusions of and the Memorandum Opinion.

It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court dated 24 day of May 1944, signed on the ex parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

10 In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, RESPONDENT

Judgment

Filed March 16, 1945

This cause coming on to be heard before me upon the petition filed by the United States of America upon the relation and for the use of the Tennessee Valley Authority, and upon the answer of the respondent, Abraham Cole Hyatt, and upon the evidence taken by the Court in several hearings, the Court, after hearing the evidence and argument of counsel, is of the opinion that the petitioner is not authorized and empowered under the Acts of Congress creating the Tennessee Valley Authority to condemn the lands described in its petition, for the reasons set forth in the findings of fact, conclusions of law, and memorandum opinion.

It is therefore ordered, adjudged, and decreed by the Court that the petitioner, Tennessee Valley Authority, is not entitled to condemn the lands described in the petition filed in this cause.

It is further ordered and decreed by the Court that the order of this Court, dated 24 day of May 1944, signed on the ex
11 parte petition of Tennessee Valley Authority, entitled "Declaration of Taking," which said order placed the Tennessee Valley Authority in possession of said lands, be and the same is hereby stricken and set aside.

It is further considered, ordered and adjudged that this action be and the same is hereby dismissed.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

12 SECTION B

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

Memorandum opinion

Filed March 17, 1945

It was agreed that the above-styled cases should be tried together, since the facts in each case are essentially alike, and the question of law in each case is identical.

The essential facts and the question of law in the above-styled cases are practically the same as the facts and the question of law in the cases of the Authority v. Fred Lollis, No. 526; the Authority v. Arnold E. Bradshaw, No. 548; the Authority v. Philip G. Rust, No. 549; and the Authority v. Abraham Cole Hyatt, No. 570; the petitioner in each case being the Tennessee Valley Authority, which I designate as the Authority.

13

I have signed a memorandum opinion in the four cases just named, and I adopt that opinion as a part of the opinion in the above-styled two cases, and am attaching a copy of said opinion to this memorandum opinion.

However, the respondent, S. Columbus Welch, has agreed that he will in no case, and under no circumstances, ask for any damages on account of any impairment, interference, or injury to his property, which may occur by reason of the flooding and covering, by the Authority's reservoir, of Highway 288. S. Columbus Welch has agreed in his pleadings to sign written instruments to this effect, relieving and releasing and acquitting the Authority, the United States of America, the State of North

Carolina, the State Highway and Public Works Commission of North Carolina, and Swain County, of and from all obligations, liabilities, claims, and damage of every nature, character, or description, whether now or hereafter existing, arising out of, or being in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience, or injury resulting to the lands owned by respondent and designated in the petition as tract FR–1092, as fully described by metes and bounds in the petition.

I am today signing a judgment in this case, holding that the Authority has no power to condemn the tract, No. FR–1092, except the acre and a half which will be covered by the reservoir. I am also including in the judgment an order requiring the respondent, S. Columbus Welch, to execute the instrument referred to, and adjudging further that he shall have no claim of any kind or character for damages against the Authority, the State of North Carolina, the United States, the State Highway and Public Works Commission, or Swain County. This binding agreement and judgment will make it unnecessary for the Authority or any one else to construct a road to Tract FR–1092, and, in order to set the whole matter out fully, I am embodying in my judgment the one proposed by counsel for S. Columbus Welch.

As to the suit against John Burns and wife, I hold that this land, not being in any way physically connected with or necessary to the construction and maintenance of the Fontana Dam, cannot be condemned by the Authority. These respondents, John Burns and wife, Julia Burns, have agreed, and I shall so order in my judgment, that they will not require either the Authority or the State of North Carolina, or Swain County, to build or maintain any access road or roads to the lands embraced in their tract, being FR–No. 19, and that they are willing that this agreement shall be entered as a part of my judgment.

This agreement on the part of John and Julia Burns, their heirs and assigns, will make it unnecessary for the Authority or anyone else to build an access road to their property.

I am of the opinion that the Authority has not the power to condemn the lands of Columbus Welch or John Burns and wife for the reasons given by the Authority's counsel. And I therefore conclude, as a matter of law, that the Authority has exceeded its power in undertaking to condemn the lands in question; and that it has no constitutional or legal right to do so.

This March 16, 1945.

E. Y. Webb,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 526

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, RESPONDENT

No. 548

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, RESPONDENT

No. 549

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, RESPONDENT

16 No. 570

UNITED STATES OF AMERICA UPON THE RELATIONS AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, RESPONDENT

Memorandum opinion

Filed March 16, 1945

It was agreed by all the parties that the above-styled cases should be tried together, since the essential facts in each case are practically the same, and the question of law in each case is identical.

All the parties agree that the lands sought to be condemned are from a half-mile to four miles from the high water mark of the reservoir.

The defendants contend that, this being so, the lands sought to be condemned have no physical connection with the Fontana Dam or reservoir and that the TVA, hereafter called the Authority,

has no power under the Acts of Congress creating it, and amendments thereto, to condemn these lands. The Authority contends that, since it agreed with the state to rebuild highway 288, most of which is or will be flooded by the reservoir, it has the power to condemn these lands, because it would be less expensive to condemn and buy the 44,000 acres than to build a new road. The Authority, considering it cheaper to buy or condemn the 44,000 acres, determined to do so; and, after having acquired title to this area, to transfer it to the National Park Service. It is a plain question of law as to whether Congress has given the Authority the power to condemn this land under the circumstances.

17 The pertinent part of the Act of Congress is as follows:

The Authority, or the corporation, "shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures and navigation projects at any point along the Tennessee river, or any of its tributaries, and, in the event that the owner or owners of such property shall fail and refuse to sell to the corporation at a price deemed fair and reasonable by the Court, then the corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this act."

It will be seen that this section gave the Authority or the Corporation the power to "acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures." Undoubtedly that language means that the Authority has the power to condemn all lands that are necessary for the construction and maintenance of the dam and reservoir. The lands in question have no physical connection with any part of the reservoir or the damsite. I do not think Congress ever intended that the power of eminent domain granted in this act should be liberally construed. The power of eminent domain is so supreme and imperial that, in my opinion, it should be construed strictly.

The Supreme Court of North Carolina, in the case of State v. Gulledge, 208 N. C. 207, says:

"It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following

18 powers, and no others: (1) Those granted in express words, (2) those necessarily or fairly implied, (3) those essential to the declared object and purpose of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

I think, in all cases of the exercise of eminent domain, where there appears any fair, reasonable doubt concerning the existence

of the power, it is resolved by the courts against the exercise of such power.

It is a dangerous doctrine to imply any eminent domain powers, and the corporation exercising such power should be held strictly to the definite powers granted by Congress.

Congress certainly never conceived that the Authority would undertake what it is doing in this case. Congress never dreamed that the Authority, in order to save some money in building a substitute road, would undertake to buy or condemn 44,000 acres of land for the purpose of dispossessing the occupants of these lands and making it unnecessary to construct the road.

I may agree that the plan of the Authority to acquire this land in order to save some money, and ultimately to transfer the land to the Park Service, is a good one. I may agree that some of the land owners, who refused to sell their homes and lands, where they have lived for years, are a little perverse or stubborn, but I cannot afford to punish their "perverseness" by "stretching" an act of Congress to the extent of giving the Authority the power to condemn their land.

19 In the case of Refining Company v. Elevator Company, 82 Mo. 121, we find this pertinent language:

"Laws which require the taking of private property for public use should be strictly construed and closely scrutinized. Nothing justifies such an invasion of private rights, but an imperative public necessity, and the exercise of this right of eminent domain, under color of which so many iniquities have been committed, should be held strictly within the bounds provided by the constitution and the laws."

Again, we find this language in the case of Hervey v. Railroad, 174 Ill. 295:

"The appropriation of private property under the right of eminent domain is an exercise of sovereign power, and when reliance is placed upon statutes conferring the right, those statutes, being in derogation of common right, must be strictly construed, and the right cannot be exercised except in strict conformity to the power conferred."

Again, in the case of Martin v. Rushton, 42 Ala. 289, the Court, among other things, said:

"In cases like the present it is always to be borne in mind that these Acts of Parliament are acts of sovereign and imperial power, operating in the most harsh shape in which that power can be applied in civil matters * * * Whoever considers the effect of this must see the consequences which frequently do happen to individuals. Property to which they have attached their whole fortunes and interests may be taken from them by an absolute

exercise of imperial power, and their whole circumstances
20 and situation in life may be entirely altered for a sum of money to be fixed by somebody else."

In Judge Cooley's Constitutional Limitations, at page 763, we find this language:

"So high a prerogative as that of divesting one's estate against his will should only be exercised when the plain letter of the law permits it. All grants of power by the Government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other, one judge saying 'an act of this sort deserves no favor; to construe it liberally would be signing against the rights of property.'"

The power of eminent domain was given the Authority "for carrying out the purposes of this chapter."

Now, what were "the purposes of this chapter"? Why, to build dams and impound water, and anything that does not help to carry out these purposes is not within the power of the Authority.

I would like to help the Authority accomplish its purpose in acquiring the 44,000-acre tract of land, and thus save the Government a considerable amount of money, but I cannot violate my conception of the Constitution and the law in order to do this. Far better that the Government should lose some money than deprive a single humble citizen of his individual right.

The Government has a simple way to add the lands in
21 question to the National Park area. All the National Park lands in North Carolina have been condemned by the state and turned over to the National Forest Service. If the lands in question are needed by the National Forest, then the state can condemn these lands and turn them over to the National Park Service. This would be a lawful way of obtaining the lands.

I might add here that, since the Authority began buying this 44,000-acre area, it has acquired by purchase already, as near as I can figure, something like 38,000 acres, and therefore it is not necessary for it to build a road of 40 or 50 miles from Bryson City to Deal's Gap. The lands in question lie only 5 to 8 miles from Bryson City, and the cost of a road to these lands would not be more than forty or fifty thousand dollars.

I am therefore compelled to conclude, as a matter of law, that the Authority has exceeded its powers in undertaking to condemn the lands in question, and that it has no constitutional or legal right to do so.

March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

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22 In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

Findings of fact

Filed March 17, 1945

The Court finds the following facts:

1. On June 8, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution, finding and determining that the condemnation of the property listed in the name of John Burns, et al., which is the subject matter of Docket No. 512, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933; as amended.

2. On April 25, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining that the condemnation of the property listed in the name of S. Columbus Welch, which is the subject matter of Docket No.
23 493, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933 as amended.

3. These determinations made by the Board of Directors of the Authority were made after the consideration of reports and recommendations presented to the Board by members of the Staff of the Authority, setting out the facts and circumstances surrounding the situation of the property involved, and were made in good faith.

4. Upon the dates of the filing of the petitions to condemn in these cases, the Authority was engaged in the construction of the Fontana dam and reservoir located on the Little Tennessee River in Western North Carolina.

5. Prior to the construction of this project, the state of North Carolina owned and maintained state highway 288, running along the north side of the Little Tennessee River from Deal's Gap, N. C., to Bryson City, N. C.

6. After the completion of the reservoir this road will be flooded throughout most of its length from the Fontana damsite to Bryson City.

7. The area of land lying on the northern side of the Little Tennessee River between the Fontana damsite and Bryson City, consisting of approximately 44,000 acres, has in the past had as its only means of access by road state highway 288, above referred to, and the roads connected therewith.

8. If this highway is flooded and not replaced, this entire area will be deprived of all road access, and will be accessible only by water or by foot trails.

24 9. In order to furnish road access to this area of 44,000 acres after the completion of the reservoir, it would be necessary to rebuild said highway 288 or its equivalent throughout most of its length.

10. The expenditure of this sum of money, and the materials, equipment, and manpower required would result in the furnishing of a road approximately equal in grades, widths, curves, and surfacing to highway 288, as it has existed in the past.

11. At the time of the beginning of the construction of the Fontana project this road was owned and maintained by the state, but it had originally been financed by bond issues upon which Swain County, N. C., was obligated.

12. When the representatives of the State Highway Commission of North Carolina, and of Swain County, were notified of the effect of the reservoir on this highway, they demanded that some action be taken to protect the state and the county.

13. During the negotiations it was suggested that one way of settling the problem would be to agree to the abandonment of the road, and for the Authority to purchase releases from individual land owners releasing the Authority, the state and the county from all liability for the loss of access.

14. While the question of the possible rebuilding of the road was under consideration, the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised.

25 15. The Authority made estimates to determine whether the area previously served could be acquired at a total cost less than the estimated cost of rebuilding the road. These studies

showed that the cost of the acquisition would be several hundred thousand dollars less than the cost of the road.

16. As a result of these studies and the attitude of the War Production Board, the Authority suggested to the State Highway Commission and to Swain county the method of settlement that was finally embodied in the contract which is in the record as Petitioner's Exhibit 8.

17. At the time this contract was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendations of its staff.

18. Upon the basis of such report and recommendations, the Board, on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority.

19. Pursuant to the terms of the contract, the Authority has already paid for the use and benefit of Swain county the sum of $400,000, and the state of North Carolina, in turn, under the authority of an act of the legislature, has paid $100,000 to the Authority on condition that that sum be used to assist in the acquisition of the land previously served by state highway 288.

20. The land owned by the respondent, S. Columbus Welch, which is the subject matter of Docket No. 493, is located on the north side of the Little Tennessee river approximately 13
26 miles from Bryson City, and approximately 15 miles from the Fontana damsite. Only a small portion of this land, approximately one and a half acres, will be below the level of the reservoir after it is filled. There will be no access to the remaining land by road in either direction. In order to furnish such access, it would be necessary to construct a road from Bryson City to the property. The cost of constructing such a road is estimated at between $450,000 and $500,000.

21. In determining to acquire this land, rather than to build the road required to furnish access, the Authority had before it, and considered, the estimates of the cost of the substitute road and the value of the land.

22. The land owned by the respondents, John Burns, et al., which is the subject matter of Docket No. 512, contains 82 acres located on the north side of the Little Tennessee river, approximately five miles from Bryson City and 20 miles from the Fontana damsite. No part of this land will be below the level of the lake created by the Fontana reservoir. After the reservoir is filled, there will be no access to this land by road in either direction. In order to furnish such access, it would be necessary to construct a road of a little over one mile in length, connecting this property with road outlets to Bryson City. The cost of constructing such

a connecting road has been estimated at $40,000, which greatly exceeds the value of the property.

23. Before determining to acquire the property of John Burns, et al., the Authority made a detailed study to ascertain the
27 cost of furnishing substitute access to this and adjoining properties, as compared with the cost of acquiring all of the properties in the area.

24. On the date of filing the petition to condemn the land the Authority was engaged in the construction of the Fontana dam, located on the Little Tennessee river at Fontana.

25. Prior to, and at the time of the construction, the state of North Carolina owned and maintained state highway 288, running along the north side of the Little Tennessee river from Deal's Gap to Bushnell, and then continuing along the north side of the Tuckaseigee river to Bryson City.

26. After the completion of the reservoir, most of said highway will be flooded from the damsite to within a few miles of Bryson City.

27. The area lying on the north side of said river between the Fontana damsite and Bryson City consists of approximately 44,000 acres, and in the past this area has used highway 288, together with certain connecting roads, as the only means of travel as an access road to said area.

28. The land owned by the respondents, John Burns and Julia Burns lies outside of the Fontana dam project, on the east border of the 44,000 acres, and is a very small portion thereof, adjoining private lands. Should highway 288 be covered by water from the reservoir, the only access road to said land would be an old cartway, laid off many years ago.

29. The resolution passed by the Board of Directors on June 8, 1944, was not necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933.

28 30. The lands described in the petition are not necessary to be condemned and taken over by the petitioner in order to carry out the purposes of said act, and the Authority has no power thereunder to acquire said land by condemnation.

31. The land owned by the respondent, S. Columbus Welch, referred to in the petition and answer as tract FR–1092, will not, with the exception of approximately an acre and a half, be submerged by water, and bears no physical relation to the Fontana project.

32. When the petitioner instituted this action and served the respondent, S. Columbus Welch, with process, said respondent, in due time, filed answer denying the right of petitioner to acquire tract FR–1092 other than that portion of same below the level of the reservoir, which said acre and a half, or whatever portion

of said tract would be flooded by the back waters of said dam, respondent in his answer agrees to convey by deed to the United States of America, and respondent further pleaded in his said answer the following:

"Respondent herewith agrees to execute a deed or instrument to the United States of America or the petition herein releasing, acquitting and discharging the Tennessee Valley Authority, its successors and assigns and its agents and employees and the United States of America, of and from all obligations, liabilities, claims, and damages of every nature, character, or description, whether now or hereafter existing, arising out of, or in any way connected with any loss, damage, interference, impairment
29 of the efficiency, value, usability or convenience of injury resulting to Tract No. FR–1092, and to any other property owned by respondent within the reservoir of the Fontana Dam, where such loss, damage, interference, impairment, or injury is or may be alleged or claimed to have resulted from or to be in any way connected with the construction of Fontana Dam or the creation or operation of Fontana Reservoir, including but not limited to:

"(a) The loss, destruction, and impairment of a means of access and access facilities of every description which shall extend to, include and relieve from any responsibility in connection therewith, the State of North Carolina and Swain County, North Carolina;

"(b) Loss, damage, impairment, interference, or injury to the property described in the petition, provided the petitioner does not take the land of respondent, other than tract No. FR–141 and that portion of tract No. FR–1092 actually flooded."

33. By amendment to answer filed by respondent in this cause, respondent pleaded the following:

"That in the event it becomes necessary for the United States Department of the Interior, the United States of America, or the State of North Carolina to acquire a right-of-way over any of the lands of the respondent set out and described in the petition as Tract No. FR–1092, for the construction and maintenance of a road or highway through and over any of said lands, this respondent hereby agrees to convey and grant unto the said United States Department of the Interior, the United States of America and/or the State of North Carolina such right-of-way over
30 and through said property as is necessary and required by the said United States Department of the Interior, the United States of America or the State of North Carolina, and this respondent here agrees and binds himself, his heirs, executors, administrator, or assigns to give, grant, and convey free of charge the aforesaid right-of-way over the aforesaid lands and agrees

that in the judgment entered by this court that such right-of-way be provided for."

34. The testimony of respondent Welch, taken upon the hearing of this cause, discloses that respondent is ready, able, and willing to execute the deed and release deed referred to in his pleadings.

35. Tract No. FR-1092, except that part of same lying below the level of said reservoir, bears no physical relation to the Fontana project, and is not necessary for the construction, operation or maintenance of the Fontana dam or anything connected with the Fontana project. The construction of a road or means of access to said tract of land is not required, and the furnishing of any means of access thereto is eliminated.

36. No part of said tract FR-1092 is taken by petitioner for public use, other than the acre and a half, or such portion as lies below the level of said reservoir, which said acre and a half, or said portion, respondent will convey to the United States of America.

37. The taking or attempted taking by petitioner of said tract FR-1092, other than the aforesaid portion lying below the level of said reservoir, is not authorized by the Congressional act creating the Tennessee Valley Authority.

31 38. I further find that John Burns and Julia Burns have agreed in their pleadings in this cause that they will not require the Authority, the State of North Carolina, or Swain County, to build or maintain any access road or roads to their lands, described as Tract FR-19, by reason of covering or flooding said highway 288 by the Authority, and I shall make this agreement a part of my judgment as to John Burns and wife. This agreement makes it unnecessary for the Authority or any one else to go to the expense of constructing a road to the lands of John Burns described in the petition.

This March 16, 1945.

E. Y. Webb,
U. S. District Judge.

In the District Court of the United States for the Western District of North Carolina, Ashville Division

No. 526

United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, petitioner

v.

Fred Lollis, respondent

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, RESPONDENT

32

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, RESPONDENT

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, RESPONDENT

Findings of fact

Filed March 16, 1945

1. On July 26, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining that the condemnation of the property listed in the name of Philip G. Rust, which is the subject matter of Docket No. 549, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

2. On July 26, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining that the condemnation of the property listed in the name of Fred Lollis, which is the subject matter of Docket No. 526, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

3. On October 7, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determin-

33 ing that the condemnation of the property listed in the name of Arnold E. Bradshaw, which is the subject matter of Docket No. 548, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

4. On December 12, 1944, the Board of Directors of the Tennessee Valley Authority passed a resolution finding and determining

that the condemnation of the property listed in the name of Abraham Cole Hyatt, which is the subject matter of Docket No. 570, was necessary in order to carry out the purposes of the Tennessee Valley Authority Act of 1933, as amended.

5. These determinations, made by the Board of Directors of the Authority, were made after the consideration of reports and recommendations presented to the Board by members of the staff of the Authority setting out the facts and circumstances surrounding the situation of the property involved, and were made in good faith.

6. Upon the dates of the filing of the petitions to condemn in these cases, the Tennessee Valley Authority was engaged in the construction of the Fontana dam and reservoir located on the Little Tennessee river in western North Carolina.

7. Prior to the construction of this project, the State of North Carolina owned and maintained State Highway No. 288, running along the north side of the Little Tennessee river from Deal's Gap, North Carolina, to Bryson City.

8. This highway was a narrow, winding, dangerous mountain road, with unsufficient widths for modern traffic, and was concededly an inferior highway facility.

34 9. After the completion of the reservoir this road will be flooded throughout most of its length from the Fontana damsite to Bryson City.

10. The area of land lying on the northern side of the Little Tennessee river between the Fontana damsite and Bryson City, North Carolina, consisting of approximately 44,000 acres, has in the past had as its only means of access by road State Highway No. 288, above referred to, and the roads connected therewith. At the hearing of this cause it appeared that the Government had already acquired by purchase thirty to thirty-five thousand acres of the tract lying west of Noland's creek.

11. If this highway is flooded and not replaced, this entire area will be deprived of all road access, and will be accessible only by water or by foot trails.

12. In order to furnish road access to this area after the completion of the reservoir, it would be necessary to rebuild said State Highway No. 288 or its equivalent to the lands of respondents.

13. The building of a road from Bryson City to Deal's Gap would have cost approximately $1,400,000, and would have required the following quantities of equipment and materials and the following man-hours of work: 4 two yd. power shovels, 2 three-quarter yd. power shovels, 15 tractors, 4 scrapers, 2 rollers, 12 air compressors, 4 drilling outfits, 3 concrete outfits, 1 threshing outfit, 2,100 cu. yds. of sand, 3,350 yds. of aggregate, 5,050 barrels of cement, 13,000 lineal feet of concrete pipe, 450 tons of rein-

forcing steels 32,500 cu. yds. of stone surface, and 500,000 man-hours.

35 14. At the time of the beginning of the construction of the Fontana project this road was owned and maintained by the State, but it had originally been financed by bond issues upon which Swain county, North Carolina, was obligated.

15. When the representatives of the State Highway Commission of North Carolina and of Swain county were notified of the effect of the reservoir on this highway, they demanded that some action be taken to protect the State and the county.

16. During the negotiations it was suggested that one way of settling the problem would be to agree to the abandonment of the road, and for the Authority to purchase releases from individual landowners releasing the Authority, the State, and the county from all liability for the loss of access. This suggestion was rejected by the State and the county.

17. While the question of the possible rebuilding of the road was under consideration, the Authority was advised by the War Production Board that it was extremely doubtful whether sufficient priorities would be granted to permit obtaining the necessary equipment and materials in time to build the road before the lake level was raised. The necessary equipment and materials could not have been obtained under the circumstances then existing without the active assistance of the War Production Board.

18. The Authority made estimates to determine whether the area previously served could be acquired at a total cost of less than the estimated cost of rebuilding the road. These

36 studies showed that the cost of the acquisition would be several hundred thousand dollars less than the cost of the road.

19. As a result of these studies and the attitude of the War Production Board, the Authority suggested to the State Highway Commission and to Swain county the method of settlement that was finally embodied in the contract which is in the record as Petitioner's Exhibit 8.

20. At the time this contract was presented to the Board of Directors of the Authority for its consideration, the Board had before it the report and recommendation of its staff, as set out in Petitioner's Exhibit 10.

21. Upon the basis of such report and recommendations, the Board on September 20, 1943, adopted a resolution approving the contract and authorizing its execution on behalf of the Authority.

22. Pursuant to the terms of the contract, the Authority has already paid for the use and benefit of Swain county the sum

of $400,000, and the State of North Carolina, in turn, under the authority of an act of the legislature, has paid $100,000 to the Authority on condition that that sum be used to assist in the acquisition of the land previously served by State Highway No. 288.

23. The Tennessee Valley Authority, the petitioner herein, has heretofore constructed a dam on the Little Tennessee river near Fontana for the purpose of impounding the waters of said river. It has heretofore acquired all lands necessary to be flooded by the waters of said river when impounded. The gates to said dam had been closed prior to the hearing of this action,
37 and the area comprising its reservoir is now in the process of being filled.

24. Prior to the construction of the Fontana dam and the impounding of the waters of said river, there was a state highway located on the north side of the Little Tennessee river and running parallel with the same from Deal's Gap (a point near the Fontana dam), to Bryson City, N. C., the same being designated and referred to as Highway No. 288. Said highway, while not hard-surfaced, was a gravel road constructed from the proceeds of a bond issue on the part of Swain county, and was maintained by said county until taken over by the State Highway and Public Works Commission of the State of North Carolina.

25. Located north of said highway and south of the present boundary lines of the Great Smoky Mountains National Park is an area comprising some 44,000 acres of land; none of which will be flooded by the impounding of the waters of Fontana dam.

26. The respondent, Philip G. Rust, is the owner of approximately 4,500 acres of land lying north of Highway 288, which said lands adjoin the southern boundary line of the present Great Smoky Mountains National Park. When the Fontana reservoir is completely filled, the high-water mark will be more than half a mile from the southern extremity of the Rust lands.

27. The respondent, Abraham Cole Hyatt, is the owner of approximately 256 acres of land lying north of Highway 288, which said lands adjoin the southern boundary line of the present Great Smoky Mountains National Park. When the Fon-
38 tana reservoir is completely filled, the high-water mark will be more than half a mile from the southern extremity of the Rust lands.

28. The respondent, Arnold E. Bradshaw, is the owner of two separate tracts of land lying north of Tuckaseegee river and Highway 288, and south of the present Great Smoky Mountains National Park. Said two tracts are a part of the 44,000 acres referred to in paragraph 3 above. Respondent Bradshaw resides on Tract FR-1020, consisting of approximately 136 acres, and uses the

same principally for farming purposes. This tract is located north of the high-water mark of the reservoir of Fontana dam, and none of said tract will be flooded.

29. Respondent Fred Lollis is the owner of approximately 230 acres of land lying north of Highway 288, which said lands adjoin the southern boundary line of the present Great Smoky Mountains National Park. When the Fontana dam is completely filled, the high-water mark will be more than half a mile from the southern extremity of his land.

30. In determining to acquire these lands, rather than to build the road required to furnish access, the Authority had before it, and considered, the estimates of the cost of the substitute road and the value of the land.

31. The greater portion of Highway 288 will be flooded by the waters of the Fontana dam.

32. There is located a state-owned public highway leading from the north of Noland's creek, where it connects with Highway 288, running up Noland's creek and into the present Great
39 Smoky Mountains National Park. This road has been used for a number of years by the residents and landowners residing on Noland's creek. This highway will not be flooded by the waters of the reservoir.

33. After Highway 288 is flooded, it would require the construction of only approximately six, or at the most eight, miles of road necessary to connect the lands in question with Bryson City, the county seat of Swain county.

34. The Authority has heretofore acquired title to all the lands located west of Noland's creek, with the exception of the North Carolina Exploration Company lands, which lands it does not seek to condemn.

35. The evidence offered by the petitioner as to the cost of replacement or relocation of Highway 288 had reference to the full length of Highway 288 from Deal's Gap to Bryson City. As shown by the maps, records, and evidence, it would be necessary to construct a road only some six to eight miles in order to reach the lands in question.

36. Some of the lands in question have been highly improved, in that various roads have been built over said lands, various modern residences have been located thereon, piped with running water, and furnished with electricity generated by Rust's privately owned power plant, and said Rust has extensively engaged in the growing of timber and the propagation of fish.

37. The lands sought to be condemned in this action are not sought to be condemned for any purpose or use connected with the building or maintenance of the Fontana project, nor
40 for any purpose for which the Authority is authorized by

the Acts of Congress to condemn lands. It is the declared purpose of the Authority, if the Court should permit said lands to be condemned, to convey them to the Department of the Interior, to become a part of the Great Smoky Mountains National Park.

38. In giving the Tennessee Valley Authority Act the most liberal construction which the Court could place upon the wording of the same, the Court would not be justified in permitting private property to be condemned when not needed for any use or purpose authorized by the Acts of Congress, and when said property is to be deeded by the condemnor for a purpose entirely foreign to that for which the Authority was created.

This March 14, 1945.

E. Y. WEBB,
U. S. District Judge.

41 SECTION C

In the District Court of the United States for the Western District of North Carolina

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, ET AL., RESPONDENTS

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, ET AL., RESPONDENTS

No. 526

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, ET AL., RESPONDENTS

Stipulation

Filed November 20, 1944

The parties to the above causes, acting through their attorneys of record, hereby stipulate and agree as follows:

42 1. For the purpose of the taking of evidence and hearing on the question of the right to condemn raised by the answers in each of said cases it is agreed that these three cases shall be consolidated and heard together.

2. It is further stipulated that on said consolidated hearing the evidence appearing in the transcript in the case of United States of America ex rel. Tennessee Valley Authority v. S. Columbus Welch, No. 493, and United States of America ex rel. Tennessee Valley Authority v. John Burns et al., No. 512, shall be treated as if offered anew as evidence in this consolidated hearing, and in the event of an appeal in any of these cases said evidence shall be incorporated in the record on appeal in proper order. The parties reserve the right to interpose objections to the competency and admissibility of any of said evidence and further reserve the right to offer any additional evidence that any of the parties may deem necessary.

WILLIAM C. FITTS, JR.,
Attorney for the Petitioner.

GEO. H. WARD,
Attorney for the Respondents.

43 In the District Court of the United States for the Western District of North Carolina

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, ET AL., RESPONDENTS

Stipulation

Filed December 30, 1944

The parties to the above cause, acting through their attorneys of record, hereby stipulate and agree as follows:

1. For the purpose of the taking of evidence and hearing on the question of the right to condemn raised by the answer filed herein it is agreed that this case shall be consolidated and heard with the cases pending under Docket Nos. 549, 548, and 526.

2. It is further stipulated that on said consolidated hearing the evidence appearing in the transcript in the case of United States of America ex rel. Tennessee Valley Authority v. S. Columbus

Welch, No. 493, and United States of America ex rel. Tennessee Valley Authority v. John Burns, et al., No. 512, shall be treated as if offered anew as evidence in this consolidated hearing and in the event of an appeal in this case said evidence shall be incorporated in the record on appeal in proper order. The parties reserve the right to interpose objections to the competency and admissibility of any of said evidence and further reserve
44 the right to offer any additional evidence that any of the parties may deem necessary.

THOMAS J. GRIFFIN,
Solicitor.

WILLIAM C. FITTS, JR.,
Attorneys for the Respondents.

JONES, WARD & JONES,
Attorneys for the Respondents.

In the District Court of the United States for the Western District of North Carolina, Asheville Division

No. 493

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

S. COLUMBUS WELCH, RESPONDENT

No. 512

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

JOHN BURNS, ET AL., RESPONDENTS

No. 526

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

FRED LOLLIS, ET AL., RESPONDENTS

45

No. 548

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ARNOLD E. BRADSHAW, ET AL., RESPONDENTS

No. 549

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

PHILIP G. RUST, ET AL., RESPONDENTS

No. 570

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

ABRAHAM COLE HYATT, ET AL., RESPONDENTS

Order

Filed April 7, 1945

This cause having come on to be heard on application of the parties for an order consolidating the above actions for purposes of appeal, and it appearing to the Court that the parties have stipulated that the above actions shall be consolidated, and it further appearing that the above actions involve common questions of law and fact and that their consolidation will serve the convenience of the Court and of the parties and will tend to avoid unnecessary costs and delay.

46 It is ordered, adjudged, and decreed that the stipulation of the parties filed in this cause on April 7th, 1945, be and the same hereby is approved.

It is further ordered, adjudged, and decreed that the above entitled causes be and hereby are, for purposes of petitioner's appeal only, consolidated into one action in this Court and that the orders and proceedings heretofore had in said causes respectively are hereby made orders and proceedings in this cause and that the consolidated cause proceed under the title United States of America, upon the relation and for the use of the Tennessee

Valley Authority v. S. Columbus Welch, et al., No. 493, consolidated cause.

Done this 7th day of April 1945.

E. Y. WEBB, *Judge.*

O. K.

THOMAS J. GRIFFIN,
Attorney for petitioner.

MCKINLEY EDWARDS,
Attorney for respondents in No. 493.

B. C. JONES,
Attorney for respondents in No. 512.

GEO. H. WARD,
Attorney for respondents in Nos. 526, 548, 549, and 570.

47 SECTION D

TESTIMONY BEFORE THE DISTRICT COURT

ROBERT E. FRIERSON, for Petitioner

ON DIRECT EXAMINATION

Q. You are employed by the Tennessee Valley Authority, are you not?

A. I am.

Q. And what is your present position?

A. I am Senior Civil Engineer in charge of the Land Purchase Control Section of the Maps and Surveys Division.

Q. How long have you occupied that position?

A. About ten and a half years.

Q. Will you describe in general the duties of that position?

A. Under the general policies established by the Board, to determine the extent of lands required for the various reservoir projects [tr. 57].[1]

* * * * *

Q. What part did you take, if any, Mr. Frierson, in determining what land was to be acquired in the Fontana Reservoir area?

48 A. Well, I'm in charge of the section of the Maps and Surveys Division that determines the extent of land requirements for the reservoir project.

[1] With the exception of the testimony of Mr. Frierson on pp. 57–60, infra, all of the testimony herein is from the transcript in the Welch and Burns cases. As used herein "tr." refers to the paging of the transcript in Volume II of the record. This does not correspond to the paging in the reporter's original transcript.

Q. What type of studies or investigations did you make in that area?

A. Well, our division makes a detailed property map of each tract of land affected, and with copies of those maps and aerial photographs in hand, representatives from my section inspect the reservoir tract by tract, and then I secure information on the behavior of the water after impoundage from the hydraulic engineers, estimates of various road costs from the highway engineers, estimates of land value from the appraisers of the Land Acquisition Department——

By the COURT:

Q. Did you say road costs, Mr. Frierson?

A. Estimates of road cost for providing access to various parcels of land.

By Mr. FITTS:

Q. Mr. Frierson, without stating any detail yet about this, just tell me what that is and whether it was prepared by you [handing map to witness].

A. It is an area map of the Fontana Reservoir project, prepared under my supervision and direction.

Q. Well, now does that accurately represent what it purports to represent?

A. It does.

Q. And you are so testifying?

A. Yes, sir.

49 Q. Is that correct?

A. That's correct.

Mr. FITTS. We will offer in evidence as Petitioner's Exhibit No. 3 the map referred to by the witness, which is entitled "Fontana Reservoir Area, Showing Pool at Elevation 1723." I am offering it now and then I will let the witness explain what it purports to show [tr. 59–61].

* * * * *

Q. Mr. Frierson, there are some other properties shown on this map, Petitioner's Exhibit 3. The ones on the north side of the river that are in this cross-lined yellow and brown, what is that property?

A. That's land which the Authority is acquiring and plans to turn over to the Park Service [tr. 62–63].

* * * * *

Q. Now, where on this map is shown, if at all, the course of State Highway 288 through that area?

A. It's on the north side of the river, north side of the lake, and is shown in red everywhere it is below the pool. Where it is above the pool it's in a double line, very small.

Q. But wherever on the map that red line meandering along the northern side of the lake appears, that's the highway where it would be under water. Is that correct?

A. That's correct.

* * * * *

Q. Mr. Frierson, before offering it I would like to have you tell us what this exhibit is which is labeled "Aerial Photo-
50 graphic Mosaic, Fontana Reservoir Area," and who made it up [handing document to witness].

A. It's an aerial photographic mosaic of the Fontana Reservoir. That is, it's an aerial photograph matched together in a composite picture of the entire reservoir area. It was made in my office under my supervision and direction [tr. 63–64].

* * * * *

By the COURT:

Q. Let me ask him this question. All the areas mounted with red in that exhibit, Mr. Frierson, are the contested lands in this suit?

A. They were the lands which I understood were being contested [tr. 65].

* * * * *

By Mr. FITTS:

Q. Will you explain any markings on that mosaic that have not been explained?

A. The blue line shows the outline of the reservoir pool after impoundage.

* * * * *

A. The orange line shows the boundaries to which the Tennessee Valley Authority has purchased or is attempting to purchase [tr. 66].

* * * * *

Q. Now Mr. Frierson, taking up again Petitioner's Exhibit 3, the colored map, I wish you'd look first at the John Burns property, and I want to ask you whether or not you or those working under your direction participated in any study or investi-
51 gation designed to determine whether that property could be left out of the acquisition program [tr. 67].

* * * * *

A. Yes, sir; I made such a study.

Q. What did you do?

Mr. EDWARDS. Object.

The COURT. I will let him answer that.

A. I secured, or requested from the Land Acquisition Department and secured estimates of values of not only the John Burns property but all of the properties in the Peachtree Creek Valley, to see whether or not——

The COURT. That includes the Columbus Welch tract?

Mr. FITTS. No, sir; it's in a different area. This study is on the area where the John Burns property is.

The COURT. All right.

Q. Go ahead, sir.

A. To see whether or not a road could be constructed into the Peachtree Creek Valley at a price less than or equal to the value of the properties which the road would serve. In the Peachtree Creek Valley there, there were some ten or fifteen tracts of land that contained about 1,200 or 1,220 acres.

By the COURT:

Q. You are still talking about the Burns tract now?

A. Just the Burns tract. It is the only tract that was——

Q. The eighty-two-acre tract; all right.

A. But there were some eight or ten other properties in that valley.

52 Q. Since that time you have acquired those, haven't you?

A. Yes, sir.

Q. Got all except the Burns tract in there?

A. Yes, sir.

Mr. JONES. I think you have it incorrect, Your Honor. There is one tract that is not in there. I know you haven't paid for it.

The WITNESS. Well, I will answer that so far as I know.

Mr. JONES. That's all right, as far as you know.

By Mr. FITTS:

Q. Go ahead, sir.

A. There were some 1,220 acres in there and the estimated value of it was around $23,000, all the land in the valley. One road would serve all of the land. If we get a road in there, it would serve all the properties in the valley. But the estimated cost of providing this road over the high ridge between Lands Creek and Peachtree Creek was $40,000.

By the COURT:

Q. That was before you acquired these 1,200 acres, wasn't it?

A. Yes.

Q. Since that 1,200 acres was acquired, what would be the necessity of the road?

A. There would be no necessity for the road except for the one tract.

By Mr. Fitts:

Q. What would be the situation of the John Burns tract—let's get right to that—if no road were built to it and that tract were not acquired?

53 A. It would be completely isolated [tr. 69–71].

* * * * *

Q. Is there any way in or out, after the reservoir?

A. No way by road.

Q. And what would it take, physically, to get a road?

A. It would require a little over a mile of road, estimated at $40,000.

Q. $40,000 you testify it would take to provide access to this one piece of isolated property. Is that correct?

A. That's correct [tr. 72].

* * * * *

Q. Mr. Frierson, will you look at the S. Columbus Welch property on the colored map and tell us whether any study or investigation was made by you to determine whether it was economically feasible to give road access to that property after the reservoir was up?

A. No special study was made of that. It was so far away from where the roads were above water that it would have taken, it was apparent, it was obvious, that the road costs would be many, many times the value of the property, so no detailed study was made of that particular case.

Q. Well, as that property is situated physically, what would be required in order to give any access by road?

A. Well, it would take some twelve to thirteen miles of road on the north side of the reservoir from the Bryson City end of 288, at an estimated cost of between $450,000 and $500,000. I haven't added those up exactly [tr. 74].

* * * * *

54 ON CROSS-EXAMINATION

Q. Mr. Frierson, how far is this tract of land of Welch's from the dam site?

A. It must be fifteen or twenty miles.

Q. Well, you will admit that the only reason the petitioner in this case should want this tract of land is on account of the question of a road to it?

A. No, sir.

Q. What?

A. No; I wouldn't admit that.

Q. You won't admit that? Well, now I'll just go fishing with you a little here. What else do they need it for?

A. Well, there are other reasons for acquiring private ownership islands inside of government lands besides the mere question of access.

Q. All right, now come back down to this. In the construction of the Fontana Dam they don't need one foot of this land?

A. That's——

Q. Except the part that it floods, about an acre.

A. That's a question of opinion.

Q. What?

A. That's a question——

Q. I am asking you, now let me get down to the facts. They don't need a stick of timber that is on it to put in the construction of the dam, do they?

A. I don't know. I didn't construct the dam.

Q. Well, the dam's already built?

A. It's being built.

55 Q. Well, isn't the concrete poured, finished?

A. No.

Q. How much do you know about that business down there? When were you down at Fontana last?

A. Oh, about six months or a year ago, between six months and a year.

Q. Oh. Well, don't you know that they've about finished work down there?

A. It isn't finished.

Q. All right, now, Mr. Witness, can you tell this honorable Court any part of that land except the one acre or more that's flooded that is of any necessity whatever to the construction of the Fontana Dam project?

A. Are you limiting that to the construction?

Q. Absolutely. That's what my question was.

A. No; it isn't necessary for the construction.

Q. No. Well, now let's just be frank and fair about it, Mr. Witness. I will ask you again if you want to admit to this honorable Court that the only purpose and reason for the Tennessee Valley Authority, the petitioner in this case, to take this Welch tract of land, is on account of closing his access road to it.

A. No, I wouldn't—I wouldn't say so.

Q. What?

A. Not entirely so.

Q. Well, all right, please tell us what else they needed it for?

A. Well, let me explain briefly that to leave——

Q. I've left the gap wide open to you; you can explain anything you want to.

56 A. Well, go ahead and talk.

Q. But I want you to answer my question. What else do they need it for?

A. Well, you let me explain it in my own words.

Q. Well, the proper way, Mr. Witness—let me help you a little—is to first answer and then explain.

A. Well, you asked——

Q. Well, I'll be fair with you. You can go either way you want to.

A. I thought your question was to explain what they need it for.

Q. All right; we'll let you do that—if you you can.

A. All right. An island of private ownership in government land is undesirable for a good many reasons. In acquiring land for a large project like this, there's a certain amount of land that the government gets that is not flooded, and to leave one little parcel of privately owned land inside of a large body of government land would be uneconomical, hard for management, fire control, policing, it would require marking of the boundaries to keep the government from encroaching on the private land and the private owner from encroaching on the government land; and if the Authority ever wanted to lease the property, cut timber or plan some recreational development on it, or any purpose for which it may want to use a block of land which it had acquired from the various owners there, here would be this small island ownership in the middle of it which would create a problem on any type of development they may choose to make on it [tr. 94–97].

57 ON DIRECT EXAMINATION

Q. Mr. Frierson, is this the same map as the one you testified concerning in the S. Columbus Welch case with certain additions?

A. It is.

Q. What are those additions that you have put on this map?

A. I've added on this map some eight or ten additional properties—the Bradshaw properties, Lollis properties, Philip G. Rust and Abraham Cole Hyatt properties [tr. 10].

* * * * *

Q. And before TVA came into that area—before TVA started the construction of the Fontana Dam, what was the means of access to and from the Rust property?

A. It was down the road along Nolands Creek to Highway 288; thence out along Highway 288.

Q. Now if Highway 288 were flooded out and not replaced—no substitute built for it—would there be any way in or out of that property by road?

A. No.

Q. Would there be any way to get in or out of it without going over other Government-owned land?

A. No, sir.

Q. Did you make any kind of study or survey to determine the feasibility of building substitute road access into that property?

A. Yes; it would require that portion of the relocated
58 Highway 288—or the proposed relocated Highway 288—from up near Lands Creek to Nolands Creek, which was estimated at about $330,000.

Q. In other words, your best judgment on the basis of that study is that it would cost something over $300,000. Is that correct?

A. Yes; that's right.

Q. With respect to the Lollis property, is that adjoining the Rust property?

A. Yes; it adjoins the Rust property on the southeast.

Q. How many acres in this tract, approximately?

A. There are 194 acres in the Fred Lollis property.

Q. Is the road situation and the access situation substantially the same on the Lollis and Rust properties?

The COURT. Yes; I imagine so except the Lollis's is a little nearer Bryson City.

A. That's corect.

Q. How many acres in the Hyatt tract?

A. 206 acres. Well, there are two tracts. 206 in one and 21 in the other.

Q. Is there any difference in the road situation?

A. It's a little further from Bryson City than the Rust property.

Q. Probably essentially the same?

A. Yes, sir.

Q. There are four of those Bradshaw tracts?

A. Yes.

Q. Just for the record, do you have the acreage of each of those tracts?

A. Yes.

Q. All shown on the map?

59 A. Yes. On tract 1024, which is up on Nolands Creek, there is 18 acres. On Tract 1020 which is up on Hickory Flat Branch there is 113 acres. On Tract 1006 which is up on Peachtree Creek there's 16 acres. Tract 1007 is also up in the Peachtree Creek Valley and it has 111 acres.

Q. With respect to those Bradshaw tracts, is the road situation essentially the same?

A. Yes, sir.

Q. Just as you have described for the others?

A. That is correct.

Q. Now, so there will be no misunderstanding, none of these tracts will be flooded by the Fontana Reservoir?

A. No; none of them.

Q. They would all be isolated and without road access unless substitute roads were built into them? Is that correct?

A. Yes.

Q. Anybody living at present on these tracts, Mr. Frierson?

A. They have all moved out except someone is living on the Bradshaw tract up on Flat Branch—that is 1020—and there is a tenant up on the Hyatt tract.

Q. There are people living on the Rust tract, aren't there?

A. Yes; on the Rust tract.

By the COURT:

Q. That's the big tract?

A. Yes, sir.

Mr. FITTS. For the record, Your Honor, I would like to
60 offer as Petitioner's Exhibit No. 4 the mosaic—the aerial picture that we had in the other record as Petitioner's Exhibit No. 4.

(Above described photographic mosaic was received in evidence and marked "Petitioner's Exhibit No. 4.")

By Mr. FITTS:

Q. Mr. Frierson, looking at Petitioner's Exhibit No. 4 for just a minute, have you made any changes on that?

A. We've added these four additional ownerships.

Q. You've just added the outlines of the additional ownerships?

A. Yes. [tr. 11–14.]

FRANK W. WEBSTER, for Petitioner

ON DIRECT EXAMINATION

Q. And what is your present position with TVA?

A. I'm the head of the Highway Division of the TVA.

Q. And how long have you held that position?

A. Since September 20, 1934.

Q. Will you describe generally the duties of that position?

A. The duties of that position require the location and design of access roads to the Authority's dams, further require the study of the effect of the various reservoirs on state and county roads, the preparation of a general plan of highway replacements, discussion with the government agencies owning the roads of the reservoir effects and the proposed replacement plans, and negotiations with these agencies, state and county, looking toward a contract for relocations which must be approved by the Board of Directors.

61 Q. In how many of the reservoirs constructed by TVA have you been responsible for the road relocation and readjustment work?

A. In seventeen.

Q. Can you give us your best estimate as to the total amount of money that has been expended in those relocations under your supervision?

A. Approximately $34,000,000.

Q. And how many states and counties have you dealt with in these various reservoirs?

A. I've dealt with six states and forty-four counties.

Q. In determining what roads are to be replaced or relocated and what roads are to be abandoned in a particular reservoir, what factors are taken into consideration?

A. The service to the people living in the immediate reservoir area, the service to people living in areas adjacent thereto, and considerably removed, as a through road proposition, and the use to which the land can be put, particularly for agricultural purposes.

Q. In situations where the flooding of roads will result in depriving landowners of access to their property, what alternative methods are considered of dealing with the problem?

A. First, the replacement of a road to provide substitute access. Second, the purchase of the property itself in fee simple. Third, the purchase of releases for impairment of access, or payment for impairment of access, together with releases to the TVA and to the owner of the road.

62 Q. In general, in deciding between those possible alternatives, what factors are taken into consideration?

A. The value of the road to the people who live in the area and to other people adjacent to the area, and the cost of the road.

Q. Now are you generally familiar with the area of land lying between the northern edge of the Fontana Reservoir and the present southern boundary of the Great Smoky Mountains National Park, which area extends roughly from Fontana Dam on the west to Bryson City on the east?

A. I am.

Q. Approximately how many acres are included in that area?

A. Approximately 44,000 acres.

Q. Prior to the beginning of the Fontana Dam, about how many families resided in that area?

A. Approximately 216.

Q. Prior to the beginning of the construction at Fontana Dam, by what road facilities was that area served?

A. It was served by State Highway 288 and connecting county roads, county type roads.

Q. Now between what points did this State Highway 288 run, and what was its total length?

A. It ran from Bryson City to the Tennessee state line at Deals Gap, and it was approximately fifty miles long.

Q. Will you describe the nature and type of this road before the reservoir, with reference to the type of construction, its width, grades, curves, surface and general condition?

63 A. The road was located through very rough country. It followed closely the contours of the steep mountains that exist there; it was very narrow, approximately sixteen feet wide exclusive of ditches; it had very sharp curves; it had a thin surface of macadam about fourteen feet wide, and I would say that it was unsafe for two cars to pass except at moderate rates of speed. In other words, it was a very narrow, crooked, dangerous road.

Q. Was this a state or county road?

A. It was a state road.

Q. Within what county was it located?

A. Swain County.

Q. Will this road be flooded by the Fontana Reservoir?

A. It will.

By the COURT:

Q. All of it?

A. No, sir, twenty-seven and a half miles, approximately.

By Mr. FITTS:

Q. Will it be flooded in such a way that it is not usable as a road?

A. Yes, sir.

By the COURT:

Q. That is, the twenty-seven and a half miles?

A. Well, the whole thing. You couldn't use any of the road for any purpose except about two miles next to Bryson City. That would be a stub.

By Mr. FITTS:

Q. And that's because it's cut into pieces?

64 A. That's right. It's cut into pieces by the arms of the reservoir.

Q. Flooded at different segments along the road?

A. That's right [tr. 106–111].

* * * * *

Q. Assuming that the reservoir were permitted to flood this road and nothing whatever were done about it, what would be the

situation of this area that you have mentioned, with resepect to access?

A. It would be completely isolated so far as road access is concerned.

Q. What would be required for any substitute access roughly equivalent to the access provided by Highway 288?

A. The construction of a road approximately parallel with the Fontana Reservoir, extending from a point near Fax Branch to a point two or three miles west of Bryson City.

Q. (Handing document to witness.) Mr. Webster, will you look at this map which is designated "Highway and Railroad Relocations, Fontana Reservoir," and tell me first whether that was prepared by you?

A. It was prepared under my supervision.

Q. And does it accurately show what it purports to show?

A. It does [tr.111–112].

* * * * *

Q. Mr. Webster, will you take it, please sir, and explain what it shows?

A. This map shows the Fontana Dam and Fontana Reservoir——

65 The COURT. Shows what?

A. Shows Fontana Dam and Fontana Reservoir. And it shows the area between Deals Gap and Bryson City on the north side of the Little Tennessee River. It also shows in green those portions of State Highway 288 which will be flooded by Fontana Reservoir, in green, down inside the reservoir line, down in the river.

Mr. FITTS. Inside the water.

By the COURT:

Q. What does it mean?

A. That shows the parts of Highway 288 which would be flooded. Now the red shows the parts of 288 which would have had to have been rebuilt if a relocation had been made.

By Mr. FITTS:

Q. In other words, the red is the road that you would have to build to take the place of 288?

A. That's right. And it shows in blue the parkway.

By the COURT:

Q. How long is that road that you've got marked in red? How long would it have to be?

A. Thirty-two miles.

By Mr. Fitts:

Q. Mr. Webster, what is your best estimate of the cost of furnishing that substitute access to take the place of Highway 288?

A. $1,400,000 [tr. 112–113].

* * * * *

Q. And what is your best estimate, Mr. Webster, as to the
66 types and amounts of construction equipment, materials and supplies that would have been required for the construction of that substitute road?

A. Assuming a construction period of one year, I estimate it would have required four two-yard power shovels, two three-quarter yard power shovels, fifteen tractors, four carryall scrapers, two sheepsfoot rollers, twelve air compressors, four drilling outfits including wagon drills, jack hammers, and so forth, three concrete outfits including mixers, rollers, conveyors, pumps, vibrators, hoists, saw reels, and so forth, one thrashing outfit including a screening plant. I estimate the materials required at 2,100 cubic yards of sand, 3,350 yards of coarse aggregate, 5,050 barrels of cement, 13,000 lineal feet of concrete pipe, 450 tons of reinforcing steel and 32,500 cubic yards of crushed stone surface.

Q. Well, now, Mr. Webster, could that equipment and material have been procured without preference ratings and priority assistance from the War Production Board?

A. No, sir.

Q. Did you have any assurance that such preference ratings could have been obtained?

A. No, sir.

Q. What is your best estimate as to the number of man hours that would have been required in that construction?

A. 500,000 man-hours.

Q. If such substitute access had been built, at the cost that you have outlined, what type of facility would have been ob-
67 tained, with particular reference to width, grade, curves, surfacing and general conditions? If you spent all that, what would you have?

A. You'd have a road graded to a width of eighteen feet exclusive of ditches; it would have been very crooked, curves as sharp as fifty-foot radius, sight distance as low as 150 feet; would have had a surface of macadam, thin macadam surface about three inches thick.

Q. What would it take to get a really good road in there? Have you got any idea?

A. Yes, I——

The Court. I don't expect you could get a very good road in there.

A. You could probably get a road comparable to this parkway, I'd call that a pretty good road, although very crooked, for between three and four million dollars.

By the COURT:

Q. You are just talking about what it would cost to build one as good as the state had down there?

A. That was $1,400,000.

By Mr. FITTS:

Q. $1,400,000 to get one just like the state had, or as close to it as we could get. In attempting to reach a solution of this road problem arising out of the construction of the Fontana Dam and reservoir, did you deal with the State of North Carolina or with Swain County or with both?

A. Both.

Q. What was the interest of the state in this matter?

Mr. EDWARDS. Object.

68 The COURT. Well, I believe I will sustain the objection. We know what the interest of the state is. It's a state road.

Mr. FITTS. All right, your Honor.

Q. Mr. Webster, in the negotiations, what was it that the state insisted upon?

Mr. EDWARDS. Object.

Mr. FITTS. Now, Your Honor, that's a question of what actually happened.

The COURT. I will let him answer the question.

Mr. FITTS. He was there.

A. The state insisted that we take the interest of Swain County, as far as obligations would permit, that we purchase, that if Highway 288 were not rebuilt, that we purchase all the property in fee simple which used that road for access, and that we make a substantial payment to Swain County within the limits of our legal liability, to reimburse them partially for their bonded indebtedness in building that road.

Mr. EDWARDS. Respondent Welch objects to the answer and moves to strike it out.

The COURT. Let it be overruled.

Q. In these negotiations, Mr. Webster, what alternative solutions were considered?

A. One alternative was to purchase all of this property in fee simple and apply the difference between the cost of this property and the estimated cost of relocating 288, to building a road on the south side of the river between Fontana Dam and Bryson City.

This was rejected by the state because of the fact that it
69 wouldn't protect the interest of Swain County, they wouldn't get anything out of it at all since this road would be in

Graham County, and also because the amount of money left over after buying the land would have been so small that it wouldn't have gone very far on a road.

Another alternative considered was for the TVA to purchase this land and turn it over to the state, who would hold it as a sort of a bargain matter with the Park Service until the Park Service was actually able to build the road. The TVA Board turned that down.

A third alternative was to purchase the land as it was finally agreed, and to pay Swain County only $200,000. This was rejected by the state at the insistence of Swain County.

Q. Well, now what was the position of the State——

Mr. EDWARDS. Object.

Q. In their negotiations with you, in reference to any alternative that left this area in private ownership without road facilities?

The COURT. I will permit that question to be answered over objection, Mr. Edwards. I am not sure whether it really bears on the question of law in this case or not, but I will hear it.

Mr. EDWARDS. Very well, Your Honor.

A. The state insisted that we must purchase all of this land in fee simple if the road was not replaced.

Q. Was a contract finally agreed upon?

A. Yes.

Q. (Handing document to witness.) Are you familiar with the document?

70 A. Yes, sir.

Q. Is that a correct copy of the contract as agreed upon?

A. Yes, sir; it is.

Q. It is also certified as a correct copy by the Assistant Secretary of the Authority?

A. Yes, sir [tr. 114–119].

* * * * *

By the COURT:

Q. Now Mr. Webster, what was your agreement with the park people?

A. That contract provided that the Authority would purchase all of this land between Twenty Mile Ridge on the west and the ridge between Peachtree Creek and Lands Creek on the east.

Q. That's the 44,000 acres?

A. Yes, sir. And between the park line on the north and Fontana Reservoir on the south, except certain mining interests. There was one mine excluded, Fontana Copper Company, I believe. After the purchase of this property, the Authority was to turn this property over to the National Park Service, for a considera-

tion. A consideration was set up in the contract that the National Park Service——

Q. What were they to pay for it?

A. Well, they were to build a road.

Q. You mean the park people?

A. As soon as Congress would appropriate the funds, they were to build a road extending through this area and being a part of their park road service.

Q. Is that the only consideration they paid the TVA?

71 A. They weren't to pay the TVA anything, just to build that road.

Q. In other words, the TVA, after acquiring this 40,000 acres, was to deed it to the Park Service free?

A. That's right.

Q. And the Park Service wasn't to pay anything for it at all except to build a road?

A. Yes, sir.

Q. Where was that road from?

A. That road was to start down near Fax Branch, a few miles below Fontana Dam or west of Fontana Dam, and was to extend approximately parallel with the reservoir on the north side.

Q. Parallel with what?

A. With the Fontana Reservoir, to a point two miles west of Bryson City or to the boundary of the park line.

Q. That was to go through this 40,000?

A. That's right. Well, it was to extend really into Deals Gap.

Q. Would it cut through or cross this 160 acres of land belonging to Columbus Welch?

A. I doubt it. It's never been finally located, but I don't think it would.

The Court. Very well.

By Mr. Fitts:

Q. Mr. Webster, what were the compelling reasons in the negotiations for abandoning the alternative of rebuilding Highway 288?

A. Well, one was the saving of critical materials and manpower during the war. The second was to provide a means by
72 which the state and the region might ultimately get a good road, a road with reasonable alignment and sight distance and fairly safe.

By the Court:

Q. You mean this road the park was to build?

A. Yes, sir; whereas this road the TVA would have built to replace 288 wouldn't have been much better than this present road, which isn't much good for the traveler.

By Mr. FITTS:

Q. What were the compelling reasons why the alternative of leaving this whole area just outstanding in private ownership, without the construction of any roads, was rejected?

A. Well, the state and county and the TVA didn't—at least the state and the TVA; I'm not sure about the county—were not willing to leave this road—to leave this property without access, because of the fact that you couldn't get the law enforcement agencies' personnel, health and medical personnel——[tr. 121–124].

* * * * *

Q. Did you finish that answer, Mr. Webster?

A. Yes, sir; I think I did. No, there's one other point, that Swain County wouldn't have had any aid in reducing her bonded indebtedness under such a plan [tr. 125].

* * * * *

Q. Mr. Webster, in your opinion what are the advantages, if any, of the method of settlement of this road problem that was finally agreed upon? [tr. 127].

* * * * *

73 A. In the first place, this settlement disposed of the problem of providing access to these areas. In the second place, it made possible the ultimate construction of a good road that would have been serviceable to through traffic.

By the COURT:

Q. You mean the park road?

A. Yes, sir. If we had gone on and built that road as it was, it would never have been of much or any value to either the State of North Carolina or Tennessee or the country, anybody except the people that lived right in it. It was too narrow and crooked to be of much use for a through road.

Q. There are no people living in that 44,000 acreage?

A. Not now, but this was before this was settled.

Q. This good road that would be built by the park people would be built after the war was over and if Congress appropriated enough money to do it, which you think will be about three million dollars?

A. My point is that if we had gone on and built this road as a replacement, it wouldn't have been much, if any, better than what we now have, and it would probably have made this whole idea of getting a good road impossible.

Q. I see the point. I think you gentlemen acted with the very finest motives and my heart is absolutely with you, but the question worrying me is whether or not, under all these circumstances,

you can go and take a man's land away from him when the project under which you are operating doesn't need it for project
74 purposes, just because you want to give it to another branch of the government or turn it over to the state, or just because you don't want to build a road. Anything else?

A. Well, the third advantage, as I see it, it helped Swain County out. It gave Swain County $400,000 [tr. 128–130].

* * * * *

A. Another advantage is that it greatly added to the value and worth of the National Park, by getting this land and extending its borders down to the lake.

By Mr. FITTS:

Q. Mr. Webster, will you look at this Petitioner's Exhibit 3, the Fontana Reservoir area map. You see on that map the property listed in the name of S. Columbus Welch that we have been speaking of?

A. Yes, sir.

Q. With the reservoir impounded, what would be the situation of that property physically with respect to access, if it is left in private ownership?

A. Be isolated [tr. 130–131].

Q. What physically would be required to provide a substitute means of access to that property?

A. The construction of a new road extending from that property parallel to the lake and above the reservoir into Lands Creek.

By the COURT:

Q. That's the red marking you showed us in the other map?

A. Yes, sir; it's most of that. It stopped where that red
75 line crosses the road at Lands Creek. You wouldn't have to go quite as far, but that's most of it. Then from Lands Creek you could travel over a county road by Franklin Grove Church.

By Mr. FITTS:

Q. What is your best estimate of the cost it would require?

A. Well, that would require thirteen and four-tenths miles of land [sic], and using the same width as U. S. State Highway 288 we estimated it would cost $600,000, using that same type of road.

Q. Now on Petitioner's Exhibit 3, Mr. Webster, can you locate that John Burns tract we have been talking about?

A. Yes, sir.

Q. Well, after the reservoir is impounded, will that tract have any access?

A. As far as I can see and know, it won't, by road.

Q. What physically would be required to give it a reasonable means of access?

A. Construction of a new road extending from Lands Creek across a high ridge into this property, extending in a westerly direction. The road would be about one mile long. The estimate of our highway engineers on the cost of it was $40,000.

Q. Was that, in your opinion, a reasonable estimate?

A. It was [tr. 131–132].

CHARLES ROSS, for Petitioner

ON DIRECT EXAMINATION

Q. Do you have any connection with the State Highway Commission of North Carolina?

76 A. I am General Counsel of the Commission and Acting Chairman.

Q. Did you have any connection with the Commission at the time that the contract between the TVA and the state regarding Highway 288 was negotiated?

A. Yes, sir; I was General Counsel of the Commission at that time.

Q. Did you participate in the negotiations for consideration of the problem?

A. Yes, I did. The direct negotiations with TVA officials were conducted by a Mr. Farrabee, our Division Commissioner, and then the results of his negotiations were relayed to me and I in turn handled them with the Highway Commission.

Q. Did you keep informed of the problems which were arising and the solutions which were being discussed?

A. Yes; I was kept informed by Mr. Farrabee at each time of his negotiations and various things. I conferred with Mr. Farrabee and also with Mr. Walker, our Division Engineer here in this territory.

Q. Now insofar as the flooding of State Highway 288 was concerned, what was the state insisting should be done?

A. Well, the matter of two solutions of that problem had been considered by the Commission for—oh, back for a good many years. In fact the question was first brought up and discussed within the Commission back before the TVA became interested, when the Fontana Dam was a project of the Nantahala Power Company.

One solution of the problem was the relocation of 288 above
77 the pond level, reconstruction at the expense of the power company, or later of the TVA. An alternative proposition that was considered from time to time was the acquirement of all the lands within the area and the conveyance of that land to the

Park Commission—I mean to the Park Service. That was suggested because of the fact that the original proposed boundary of the Great Smoky Mountains National Park, the original act of Congress and the original act of the North Carolina legislature in 1927 called for the southern boundary of the Smoky Mountain National Park to be along the Little Tennessee River, but later in the acquirement of that property the cost of it was greater than the state had contemplated and there was about 40,000 acres eliminated and the park boundary was moved north and the Federal Government finally by an amended act of Congress agreed to accept the Smoky Mountain Park and put it under control without that land, but that had remained as a sort of intangible obligation to the state through the years. The local people of Swain County that we wanted to be entirely satisfied with whatever arrangement we made were always insistent that the road should be reconstructed, and the Highway Commission was never disposed to override the wishes of Swain County in the matter and provide for the elimination of the road. It finally came to the point that we were advised by TVA that it was impossible for them to procure the necessary priorities for the construction of the road during the war period, and the alternative proposition then of buying the land, eliminating private ownership, the proposition came back to us from the TVA, and over a period of con-

78 siderable time the negotiations between the Highway Commision on the one hand and the TVA on the other and Swain County and the National Park Service was conducted until it developed that——[tr. 143–145].

* * * * * *

Q. Mr. Ross, had you finished your answer?

A. Well, I was going along with the history of the negotiations. Finally it was represented to the Highway Commission that the maximum amount of money that the TVA were willing or could legally put into the proposition was the estimated cost of the replacement of 288, and that the Swain County Board of Commissioners were unwilling to approve the elimination of 288 unless they could be paid the sum of $400,000. It was represented to us that the TVA maximum contribution, that is by purchase of the lands, would leave them only $300,000 that they could turn over to Swain County. Thereupon I took the matter up with the Governor and Council of State and asked if the Governor and the Council of State would be willing, if they had legislative authority to do so, to participate in the cost of the land to the extent of $100,000, as that seemed to be the amount that was short in order to meet these obligations, upon condition that the land would be turned over to the United States Park Service and that the

boundary line of the Great Smoky Mountain Park would be extended to the shore line, and upon the further agreement that the Park Service would, insofar as they were legally able to do, obligate to build a road which their plans showed as being a
79 part of their development of the park, that would run from the vicinity of Bryson City to the Fontana Dam.

By the COURT:

Q. Would that connect with the Park Department main highway?

A. It would be no part of the park-to-park, the Blue Ridge Parkway. It would simply be an internal development, Great Smoky Mountain National Park. Their plan of development contemplated more or less of a circular drive around the whole park, you see, and this would be a segment in that general boundary. The Governor and Council of State indicated their willingness to do the matter, and then I prepared a bill for the legislature which the Representative and Senator, Mr. Whitaker was in the Senate and Mr. Edwards in the House, they sponsored that bill and it was passed by the legislature of 1943, authorizing the Governor and Council of State to contribute $100,000 toward the purchase of this land, on condition that it was to be made a part of the Great Smoky——

Q. Purchase of the land, or to go to Swain County?

A. Purchase of the land. We were very careful, for other reasons, that the state did not participate in the matter of the highway bonded indebtedness of the county, because we thought that would open up other difficulties [tr. 147–149].

* * * * *

By Mr. FITTS:

Q. If the proposal had been made by TVA to the State
80 Highway Commission that this matter should be settled not by reconstructing State Highway 288 and not by extinguishing private ownership in the area previously served by that road, but by obtaining releases from all of the individual landowners, releasing TVA and the State of North Carolina and Swain County from any liability for the destruction of access and from any obligation in the future to build any substitute access, would you in your capacity as advisor to the Commission have recommended that such a proposal be accepted? [tr. 151.]

* * * * *

A. It is my opinion that I certainly wouldn't, I know I would not have recommended to the Commission any settlement of this matter other than one of the two propositions, either that the road be rebuilt or that all private ownership be extinguished. Now the two reasons——

Mr. EDWARDS. I thought Your Honor held he couldn't give his opinion.

Mr. FITTS. Why, he held he could.

Mr. EDWARDS. All right.

A. There are two reasons why the extinguishment of private ownership would have to be complete to meet the situation, in my opinion. One is that as long as there was any private ownership, that there would be certain need, even though the individual owner might not insist on them, but there would be certain public needs of access to all of the domain of the state for the various functions of government, and after all, highways, while they do serve individual properties, in my opinion they are pri-
81 marily for the sovereign for the means of communication, in order that the——

By the COURT:

Q. What are you going to do with this 1800 acres, Mr. Ross, that they've got exempted over there in this area?

A. That is exempted for mining purposes, as I understand it, only, was the way the contract specifies.

Q. All right.

A. And then the second, so that all obligations of the State Highway Department would be eliminated only when all of the private ownership was extinguished. Then in the second place, we were very much interested in having the development of the Smoky Mountain Park extended according to its original design, and we realized, the Highway Commission discussed this frequently, that with the building of the Fontana Dam, on account of the spectacular development there, that it would become the object of tourist interest and that some arrangement was going to have to be made for the accommodation of the traffic going into this development, and if we could shift that responsibility to the Federal Government through the Park Service, that we'd be relieving the state of a big future obligation there and that we would also be providing the facilities for the development of the Smoky Mountain Park according to its plan and design.

The COURT. I think it's a fine plan, everything you did, and I thoroughly approve of it.

82 The WITNESS. And our dealings with the Park Service led us to believe that they would not accept and include in the park land unless it was completely covered by the area. Now they agreed, in the conferences with the TVA, this mining proposition was agreed to by the park officials before this contract was entered into.

Mr. EDWARDS. I object to what somebody else entered into.

Mr. FITTS. The contract shows it anyhow.

The COURT. It was entered into.

The WITNESS. And the contract resulted then and was signed by TVA, as introduced here, by the Highway Commission, by Swain County, by the Council of State and by the Park Service through Secretary Ickes.

By Mr. FITTS:

Q. Mr. Ross, do you know——

Mr. EDWARDS. If Your Honor please——

The WITNESS. The money the state paid——

Mr. EDWARDS. Just a minute, Mr. Ross.

The WITNESS. May I just complete what I have done about the contract? The state paid its $100,000 and TVA paid its $400,000 and we felt like we had gone as far as we could in that.

By the COURT:

Q. Paid its $400,000 for what?

A. To Swain County, or paid it over to the state treasurer to be held in trust for the retirement of bonds [tr. 156–159].

83 ON CROSS-EXAMINATION

Q. In other words, the state was willing to donate $100,000 to get out of the idea of maintenance of 288?

A. No; the $100,000 did not come out of the highway fund. It came out of the general fund and was appropriated upon the theory that the state owed an obligation to the Federal Government to complete the boundary of the Smoky Mountain National Park as originally contemplated, and that's set forth in the statute [tr. 168].

PERCY B. FARRABEE, for Petitioner

ON DIRECT EXAMINATION

Q. Do you have any connection with the State Highway Commission of the State of North Carolina?

A. Commissioner.

Q. Did you occupy that position at the time this contract between the TVA and the state and Swain County and the Department of the Interior was negotiated?

A. I did.

Q. Did you have anything to do with the consideration and negotiation of that agreement?

A. Well, we worked on it for about a year and a half.

Q. Can you tell me whether or not the proposition of taking releases from the individual landowners releasing the state and

county and TVA from liability for loss of access was considered by you during those considerations?

* * * * *

84 A. It was suggested as one of the alternatives of the TVA, and I objected to it.

Q. Well, now why did you object? [tr. 175.]

* * * * *

A. I objected on the grounds that under such a settlement the county or the state would get no value for a road that I maintain had some value from the state's standpoint; although it was more or less a local road, it was a state highway and I took the position that it had some value to the state system as a system, and that we would be unwilling to let the TVA go in and extinguish these claims against the road and close it without any compensation to Swain County or the state [tr. 176].

ON CROSS-EXAMINATION

Q. Now the only interest you had as a member of the State Highway Commission in that district was to see that in the closing of Highway 288 or any of the roads, that the individual property owner would have no come-back on the county or the state?

A. Well, that's one; yes.

Q. Well, Mr. Farrabee, that was the main reason, wasn't it?

A. Well, not entirely. The main reason was to effect the best possible settlement looking at the whole picture of it, both statewide and local.

Q. I see. But your obligation was to see that the state was relieved of any responsibility?

A. Yes; that was one of them.

Q. That's all you had anything to do with, wasn't it?

85 A. No, it wasn't. We had other obligations there. There was the county, and there was the value, profitable value of the road from the state standpoint rather than purely local, and——

Q. Well, I see——

A. And there were other factors——

Q. I see. What you wanted to do was to have the TVA pay over all the money that you thought was right to the County of Swain?

A. Well, we wanted to work out the best possible settlement of the problem. One was to make more certain or as certain as possible that there would at some reasonable time be an adequate road from Bryson City to the dam, if that could be worked. Rebuilding the road that was flooded would not, of course, accom-

plish that purpose, because the road to be flooded was not—well, the money we felt had been wasted in building it originally, and we were trying to prevent wasting it again [tr. 178–179].

* * * * *

Q. Just a minute, Mr. Farrabee. Now you went through all the negotiations over there with the TVA and Swain County, knew all about the negotiations?

A. That's right.

Q. Now I believe that Swain County insisted on replacement of 288 by the TVA Authority. That was the Commission's contention, it should be replaced?

A. Well, yes and no.

Q. Well, now what about the "no"?

A. Well, to begin with, we thought we could work out
86 some settlement that we wouldn't have to go—or the TVA wouldn't have to go and what we considered wastefully use a million dollars, but when we finally met one obstacle and another, we finally said: Well, it looks like there's no other way out of it; as much as we regret having to agree to throw away a million dollars, it looks as though it's the only thing to do. So we said go ahead and build the road, and felt relieved, although we knew, or felt, that we were making a mistake. And after we had done that, then the TVA some weeks later called me from Knoxville and said it would be impossible for them to go on and reconstruct 288 on account of the war and the necessary priorities and so forth, that they were unable to obtain them in time to build the road in time to close the dam to flood the present road. So then we had to start all over again and try to work out some other.

Q. The TVA now came to the commissioners of Swain County and said they would not build that road?

A. Could not build it.

Q. Could not build it?

A. That's right.

Q. All right. Now at the time they said that——

By the COURT:

Q. Did they agree to build it if they could get the War Production Board——

A. Well, that was our understanding. We had several meetings and there was just one difficulty and another, and opposition and then approval, and one wanted this and one wanted the other,
87 and after meeting for about a year, Mr. Walker, our Division Engineer, and myself just sort of threw up our hands and said: Well, just go ahead and replace the road, rebuild it, and we are through with it. That's what we did, and they said

all right. Then in two or three or four weeks or a month or something like that, they called me over from Knoxville and asked if we could come over there to the Knoxville office, and we did go over there and they announced to us that that was out, that it was a physical impossibility for them to rebuild the road by the time the water would flood the present 288, on account of priorities from the War Department [sic] and critical materials and labor, and so forth and so on; and then we started on another, and this——

By Mr. JONES:

Q. What two propositions did they make us then, Mr. Farrabee?

A. They made us a proposition then practically the same as what we finally agreed on.

Q. Or that we could enter suit in the name of North Carolina for damages covering up that road?

A. Yes; that's right, that they would go ahead and settle with the property owners and consider the matter closed, and I told them that I wouldn't consider it closed, that I thought that the state had some—there was some value to that road as a state highway other than purely local, and we would sue the TVA for some damage as a result of losing the road, because under such a settlement neither would the county nor the state get anything at all, and it would simply satisfy those that were affected and that would be all.

88 Q. Now when it came to dealing with the individual owners of land in that territory, that is the 44,000 acres, the TVA in all the meetings through its representatives assumed absolute responsibility for acquiring of that property by its own authority, didn't it?

A. That's right.

Q. And Swain County——

The COURT. The contract shows that.

Q. North Carolina had nothing to do with that; any of it. All right.

By the COURT:

Q. They did finally get your road, though, and covered it up, and in spite of that you had to pay them $100,000?

A. Well, Judge, there's a good deal to this thing. In the first place, we couldn't build a road, so then we figured, well, let's try to work this out the best way we can. So we contacted the Park Service. There is an area between the present boundary of the park and the shore line of the proposed lake that was originally intended to be included in the park and be purchased by the state. We considered that a potential liability of the state, that perhaps the Park Service would be used privately and made into nuisance

value, and so forth, and the park would demand of the state that it purchase this 440,000 acres of land—or 44,000 acres of land. So we figured if we could eliminate that possibility that the state would have accomplished something by relieving itself of a potential liability, so we all worked it around, and the best that the TVA could do at that time, it looked, was $200,000. I went
89 to Raleigh with Mr. Walker, and we went to the Governor and got the Governor to agree to put $100,000 up in order to relieve the state of a possible future demand to purchase at a tremendously increased value this 44,000 acres of land.

The COURT. I think your plan was good, and it is going to work out well if you can just get the land that belongs to these fellows here [tr. 180–184].

ON REDIRECT EXAMINATION

Q. One question, Mr. Farmer. In your opinion as a highway engineer, would the reconstruction of that Highway 288 in an equivalent manner to the way it existed, would that have been a wise and economical expenditure of money? [tr. 185.]

* * * * *

A. I did not. I thought it was wasteful originally and it would just be a repetition of the same mistake to spend more money on it. [tr. 186.]

HOWARD K. MENHINICK, for Petitioner

ON DIRECT EXAMINATION

Q. And what is your present position with the TVA?

A. I am Director of the Department of Regional Studies.

Q. Will you describe generally the duties of that position?

A. I am responsible for the direction of the work of that department, which includes assisting urban communities that are physically affected by the dam and reservoir construction
90 program of the Authority to make physical and economic readjustments, and aiding counties in governmental and physical readjustments in order to minimize any local detrimental effects resulting from the activities of the Authority and to enable them to capture all of the possible benefits of the program. Our department is also responsible for encouraging the recreation development of the shore lands of the reservoirs, and fitting these recreation developments into the state's plans for recreation development. We design——

Q. Are you generally familiar with the area of land lying between the northern edge of the Fontana Reservoir and the present southern boundary of the Great Smoky Mountains National Park,

which area extends roughly from the Fontana Dam site on the west to Bryson City on the east?

A. Yes; I am generally familiar with that area. It is a mountainous forested area containing a number of coves and valleys in which there were living at the time of the construction of the Fontana project 216 families. Of these 216 families, 104 owned their property and 112 were tenants. There were in addition about 830 transient families living in shacks and trailers who were participating——

By the COURT:

Q. What kind of families?

A. Transient families, Your Honor, who were participating in the construction of Fontana Dam.

By Mr. FITTS:

Q. Are you familiar with State Highway No. 288?

A. Yes, I am. State Highway 288 is a narrow,
91 winding road with steep grades, sharp curves, hazardous at all times of the year for driving, and particularly dangerous in wet or icy weather. It is listed on most maps as a dry weather road.

Q. Did you have any connection in your official capacity with the consideration of the problem arising out of the flooding of this highway by the Fontana Reservoir?

A. Yes, I did.

Q. What did you do?

A. This particular problem was considered one of the most difficult and complicated readjustments encountered during the construction program of the Tennessee Valley Authority. I was instructed by the General Manager to study this problem in cooperation with the other departments of the Authority and to attempt to devise a satisfactory solution for the problem and to recommend to the General Manager such a solution. These recommendations were presented by me to the General Manager on September 24, 1942, in a memorandum entitled "Fontana Reservoir, Proposed Readjustment of North Carolina Highway 288."

Q. By whom was this highway originally built and how was it financed?

A. Highway 288 was originally built by the Forney Creek Road District. In December '21 that road district issued $400,000 in bonds to finance the construction of this highway. At that time it was contemplated that this $400,000 would be sufficient to build the highway, but it proved insufficient, and two years later $200,000
additional bonds were issued. On May 2, 1938, the highway
92 was taken over by the state, but the outstanding county

road bonds were not taken over. On August 1940, prior to the county refunding program, there were outstanding because of the construction of this highway, $459,000, representing unpaid principal on these bonds and $235,000 of accrued interest, making a total outstanding because of the construction of this highway of $694,000. After the refunding program these bonds became general county obligations.

Q. At the time of the construction of Fontana, the road was state owned, was it?

A. Yes, sir; that's correct.

Q. Now in considering the possible solutions to the problems arising out of the flooding of this highway, did you give consideration to the possible reconstruction or relocation of the road?

A. Yes, we did.

Q. Well, now what conclusions did you reach concerning the desirability of following that alternative?

A. It was our judgment that that alternative was undesirable from the standpoint of the state, the county, the TVA, and the people of the region. The State Highway Engineer and the district representative of the State Highway Commission advised that the state considered it unwise to rebuild that road, that it was not particularly useful as a link in the state highway system and that to rebuild that road would represent a waste of public funds and would involve the state in the continued maintenance of a section of road which had very little value as a state highway.

93 From the standpoint of the county, the rebuilding of this road would give them only a poor road, no better than the present road, and would leave them with this same amount of county indebtedness incurred because of the original construction of the road outstanding. From the standpoint of the TVA, the construction of the road was very disadvantageous because it involved the use of manpower, materials, housing facilities, and equipment which were vitally needed in the construction of Fontana Dam. All of the housing facilities in the region that were available and all of the available manpower had been soaked up in the construction of the dam. If any of these materials or men or housing facilities had to be diverted to the construction of the road, the construction of Fontana Dam, which was a vital war project, would have been slowed down. From the standpoint of the people of the area, it meant that they would be left in there and would not have an opportunity to move out and seek an area of greater economic opportunity.

Q. Well, now in considering this situation, did you give consideration to the possibility of leaving the entire area which was previously served by this road, in private ownership without pro-

viding any substitute means of access, and taking releases from the landowners?

A. We did give consideration to that alternative, but rejected it almost immediately——

Q. With what conclusion——

Mr. Edwards. I object to his conclusions.

Mr. Fitts. He can certainly state.

The Court. Well, let him answer.

94 Q. Well, in your opinion, what were the objections to that method of dealing with the problem?

A. Well, if the problem were handled that way, it would leave the people who were living in that area with access in and out only by water or by mountain trail, and would produce intolerable social and economic problems. It would be impossible to provide adequate schooling for the children of the families, to provide shops and stores, markets for the products, necessary health, police, fire protection. It would have been waseful of public funds——

The Court. I don't think anybody but a moron would have given up his right to use the road, to start with.

A. It would have cost the Authority substantially as much to pay damages for loss of access as it would have to acquire the fee title to the land, and when the time came later for the state or the Federal Government to acquire this land for adding to the National Park, it would mean that funds would have had to be paid twice for the purchase of this land.

Q. Would there have been any way to get the National Park Service to build this improved road if that property were left in private ownership?

Mr. Edwards. Object.

The Court. Answer the question. Objection overruled.

A. Definitely not. The National Park Service has no legal authority to build the parkway except over lands which they own, unless they obtain special Congressional authorization for this purpose. Mr. Newton B. Drury, the Director of the Na-

95 tional Park Service, advised us that the National Park Service would not seek such authorization, nor would it recommend to Congress the appropriation of funds for building such a parkway unless the 44,000 acres of land were acquired and transferred to the National Park Service.

Q. Does this——

Mr. Edwards. Just a minute. I object to this answer, Your Honor, and move that it be stricken out.

The Court. Objection overruled.

Q. Does this area lie within the originally authorized boundaries of the Great Smoky Mountains National Park?

A. It does. The boundaries including this land were authorized by Congress on May 22, 1926, and they are still in effect. The land has always been scheduled for inclusion in the National Park and has not been included to date only because of lack of funds to acquire the land.

Q. Mr. Menhinick, in your official capacity did you make a final report on this subject to the General Manager of the TVA?

A. I did.

Q. Was that report the staff recommendation that was before the Board of Directors at the time it approved this Highway 288 contract and determined to acquire this land?

A. It was [tr. 188–195].

* * * * *

Q. Will you look at this report, Mr. Menhinick, headed "Proposed Agreement, North Carolina State Highway 288, Re-
96 adjustment," and tell me whether or not that is a correct copy of the report you submitted to the General Manager and which was before the Board?

A. It is a correct copy [tr. 196].

ON CROSS-EXAMINATION

Q. Well, Mr. Witness, the road they had down there, 288, wasn't any good at all, was it?

A. It served as local access to the 40,000 acres of land. It's fifty miles by that narrow, winding road from Bryson City to Deals Gap. It's sixty-one miles between Bryson City and Deals Gap south of the river, by way of Highway 19 and 129, but that sixty miles can be driven safely one hour more quickly than the distance can be covered over the hazardous Route 288, so 288 carries practically no through travel between Bryson City and Deals Gap [tr. 197].

* * * * *

By the COURT:

Q. But do you think the parkway would refuse to build a road down there just because some man owned 160 acres and was willing to give them a right of way through it?

A. Yes, sir; I do. I was so advised by the Director of the National Park Service [tr. 207].

* * * * *

Q. I understand this contract says unless the TVA acquires 44,000 acres of land that they won't build this scenic road?

A. The contract states that they will build the scenic road on condition that the TVA acquires the 44,000 acres of land.
97 Q. It wouldn't do to acquire 43,000?

A. No, sir; it would not.

Q. Or 43,999?

A. No, sir. The Park Service objects to having an island of private ownership outstanding in the midst of their National Park.

Q. Don't they run through privately owned land from here to Washington?

A. This particular question was raised at the——

Mr. EDWARDS. Now if Your Honor please——

The COURT. Wait a minute. This is a very interesting witness to me. Let him finish. He is talking to me now.

Q. Go ahead.

A. Your Honor, this question was raised with the Director of the National Park Service when we were asked if we would be willing to leave some of these tracts outstanding, and we asked the National Park Service if they would be agreeable to that, and we were advised that they would not.

Q. I don't understand that, because the road from here to Washington runs through people's private land.

A. Yes, sir. Well, they stated that their experience with the Great Smoky Mountains National Park, where they had permitted some life interests in land, had been very unsatisfactory——

Q. Life interests?

A. Yes. They had trouble with fire control, poaching, and——

Q. Well, they've got——

98 A. And policing, and they didn't want to have any more of it.

Q. Their rights-of-way have got to join some private people's land?

A. Oh, yes; but they don't want these islands of privately owned land in the midst of the National Park. You see this 44,000 acres of land will be included in the park.

Q. That isn't on account of the road, though; that's on account of the park?

A. Yes; it's on account of the park.

Q. It wouldn't affect the building of the road?

A. Except that they are unwilling to go through with the whole arrangement [tr. 208–210].

* * * * *

Q. You've seen these maps?

A. Yes, sir.

Q. I presume you agree with these other gentlemen, Mr. Frierson and the rest of them, that this 160 acres of land known as 1092 is not necessary to the building and maintenance of Fontana Dam. Is that right?

A. No, sir; I do not hold that opinion. The purchase of all of this land is essential to the building of the project, just as much

as any of the land that we will flood, because without it the TVA cannot be relieved of its legal liability because of the flooding of Highway 288 [tr. 212].

* * * * * *

By Mr. JONES:

Q. So far as you say it's necessary, this land, it's not necessary for the Fontana Dam, is it?

A. Yes, sir.

99 Q. Is it necessary in the construction of the dam?

A. Yes, sir; it is. In connection with the building of the dam and the reservoir, we flood portions of State Highway 288 and therefore incur a legal obligation to——

Q. Now you've already got Highway 288, haven't you?

A. Already have it?

Q. Yes, you have.

A. We have it on condition that this agreement is carried out [tr. 213].

S. COLUMBUS WELCH, *for respondents*

ON DIRECT EXAMINATION

By the COURT:

Q. You couldn't haul anything on a rowboat. Wouldn't it make your land almost useless if you were in there with no road?

A. Well, I think sometime there will be a road in there.

Mr. FITTS. Exactly.

Q. Why do you think that, and who will build it?

A. Well, I don't know who will build it.

Q. They are talking about building a scenic road in there. Is that the one you are talking about, the one they are going to build, the park road?

A. Well, I thought somebody might build one through there.

Q. That's a good little "if," you know; it depends on whether Congress authorizes it or not. Your land would be useless until then, wouldn't it?

A. Yes, couldn't farm it much [tr. 225–226].

100

SECTION E

Excerpt from Petitioner's Exhibits Nos. 1 and 2 in the Welch and Burns cases and Exhibits Nos. 1, 2, 2a, and 2b in the Lollis, Bradshaw, Rust, and Hyatt cases

Be it resolved, that the acquisition of the aforesaid interests in the aforesaid tracts of land by the Tennessee Valley Authority is deemed by the Board to be necessary for the carrying out of the

provisions and purposes of the Tennessee Valley Authority Act of 1933.

Petitioner's Exhibit No. 10 in the Welch and Burns cases

To: Gordon R. Clapp, General Manager. 319 NSB.
From: Howard K. Menhinick, Director, Department of Regional Studies. July 9, 1943.

PROPOSED AGREEMENT COVERING NORTH CAROLINA STATE HIGHWAY 288 READJUSTMENT

Attached herewith are four copies of a proposed agreement for the readjustment of North Carolina State Highway 288.

The parties to the contract include (1) the Tennessee Valley Authority, (2) the United States Department of the Interior, (3) the State of North Carolina, represented by the Governor, the Council of State, and the State Highway and Public Works Commission, and (4) Swain County, North Carolina. All parties have accepted the agreement in principle. The Secretary of the Interior has reviewed the present draft of the contract. We are advised that he will sign it after TVA has signed. In our judgment the signatures of the representatives of the State of North Carolina and Swain County will be obtained if the contract has already been signed by the Secretary of the Interior. We are therefore requesting review of the proposed agreement at this time by the TVA Board of Directors and, if acceptable, signature of the agreement on behalf of the Authority.

101

You will recall that North Carolina State Highway 288 extends along the north bank of the Little Tennessee River from Deals Gap to Bryson City. It lies entirely within Swain County. Construction of Fontana Dam will flood many sections of the highway between the Dam and Bryson City. The fundamental basis of the contract, therefore, from the Authority's standpoint, is the settlement of its legal liabilities arising from the flooding of this highway.

Background of the Problem

North Carolina State Highway 288 was built in the early 1920's and financed by road district and county bond issues. In 1940 Swain County assumed the district road bond indebtedness in a general refunding program and now holds approximately $700,000 outstanding bonds resulting from the construction of State Highway 288. Between Fontana Reservoir and the present boundaries of the Great Smoky Mountains National Park to the north extending from the intersection of the

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park boundary with Cheoah Reservoir below Fontana Dam on the west to Lands Creek on the east lie approximately 44,400 acres of forested, mountainous land. This land was included within the original purchase boundaries of the Great Smoky Mountains National Park. The present more limited boundary was established because the National Park Service lacked funds to acquire the property. The National Park Service still has Congressional authority to include this land within the National Park.

The replacement of Highway 288 at its present standards represents the maximum of the Authority's liability with respect to this highway. Highway 288 as now constructed affords only a very low standard of service, however, and you will recall that in its early consideration of the matter the Board came to the conclusion that the reconstruction of the road on an equivalent basis would not constitute a wise expenditure of public funds, and that such reconstruction should therefore not be effected. This same conclusion was reached by WPB which informally advised the Authority that the reconstruction of the highway was not sufficiently important to justify the expenditure of materials and manpower required. The problem accordingly became one of disposing of the liabilities of the Authority with respect to the road without actually rebuilding it and without incurring a greater cost than the estimated expense of the road relocation, all
103 in a manner which would be consistent not only with the best interests of the Federal Government but with those of the State of North Carolina and Swain County as well. I believe the attached contract accomplishes this result.

Provisions of the Contract

In summary, the proposed contract contains the following provisions:

The Tennessee Valley Authority will:

1. Acquire the 44,400 acres of land shown in Exhibit A of the contract. The 1920 acres of North Carolina Exploration Company property lying within this area are not included in the purchase. TVA reserves the right to delay acquisition of the 196 acres owned by the North Carolina Mining Corporation until six months after the cessation of present hostilities. Mineral rights may be left outstanding.

2. Transfer the above lands to the Department of the Interior, for inclusion in the Great Smoky Mountains National Park, protecting the Department against any mineral claims that may be pressed, but reserving to the TVA all rights that may be required in the carrying out of the TVA program.

3. Pay to the State Treasury of North Carolina, Treasurer Ex officio of the North Carolina Local Government Commission, in trust for Swain County, $400,000 to be used in retiring a portion of the principal of the road bonds issued by the County to finance the construction of the present State Highway 288.

The Department of the Interior will:

1. Accept on behalf of the National Park Service the
104 44,400 acres of land shown in Exhibit A of the contract and will include this land within the authorized boundaries of the Great Smoky Mountains National Park.

2. Confirm the fact that its Master Plan for the development of the Park as extended by the addition of these lands includes an "around the park" road of which the park section of a projected road between Deals Gap and Bryson City constitutes an important link. As soon as funds are made available by Congress after the war the Department will construct the park section of the above road as a high-grade parkway, and may bar commercial traffic from this road. On the west it will connect with the west abutment of Fontana Dam and with the TVA access road on the north side of Cheoah Reservoir below Fontana Dam.

The State of North Carolina will:

1. Secure the necessary right of way and construct a high-grade state highway, commencing at an appropriate point on U. S. Highway 19 in Bryson City, North Carolina, and extending to the eastern boundary of the Park where it will connect with the park road to be constructed by the Department of the Interior.

2. Take over and maintain the Fontana access road from its intersection with U. S. Highway 129 near Deals Gap to the east abutment of Fontana Dam.

3. Pay to the Authority $100,000 to aid in the acquisition of the Park land in accordance with the authority granted to the State by Special Act SB 198, enacted by the 1943 session of the North Carolina Legislature.

4. Release the Authority and the United States of
105 America from all obligations in connection with existing North Carolina State Highway 288 and all other roads located on the land shown in Exhibit A.

Swain County, North Carolina, will:

1. Release the Authority and the United States Government from any liability in connection with State Highway 288, or any other roads lying within the lands shown in Exhibit A.

Estimated Cost to the Authority

Colonel Parker, in a memorandum to me dated March 20, 1943, estimates the cost of rebuilding Highway 288 at between $1,000,000

and $1,400,000. He states that in his opinion a settlement which would cost the Authority $1,200,000 would be advantageous to the Authority.

In a memorandum to me of April 22, 1943, Mr. Ned H. Sayford presents estimates of costs of acquiring the land shown in Exhibit A at $645,000 exclusive of mineral rights. Excluding the North Carolina Mining Corporation properties, it is estimated that protection of the Department of the Interior against mineral claims that will be presented will cost the Authority not more than $80,000. The cost of acquiring the North Carolina Mining Corporation properties is estimated at not more than $50,000, making a total of $775,000 for the cost of land acquisition. The $100,000 received from the State of North Carolina will reduce the cost to the Authority of land acquisition to $675,000. Adding to this the $400,000 which the Authority pays to Swain County, brings the cost of the settlement to the Authority to approximately $1,075,000.

106 I believe that you would be interested in having Mr. Fitts explain the present status of the TVA relationships with the North Carolina Exploration Company and the North Carolina Mining Corporation.

The adjustments that will be effected by the proposed contract appear to be advantageous to the Authority, to the State of North Carolina, to Swain County, and to the National Park Service, and in general represent a desirable regional adjustment. I hope therefore that you will wish to recommend to the Board of Directors of the Authority that they approve this proposed agreement.

HKM:RMM.

CC to Wm. C. Fitts, John I. Snyder, E. W. Cowling, C. E. Blee, Frank W. Webster, Paul Ager, W. L. Sturdevant, Ned H. Sayford.

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SECTION F

TENNESSEE VALLEY AUTHORITY ACT

[Public—No. 17—73d Congress, 1st Session]

[H. R. 5081]

May 18, 1933, 48 Stat. 58

[As amended by Public—No. 412—74th Congress, 1st Session]

[H. R. 8632]

August 31, 1935, 49 Stat. 1075

[As amended by Public—No. 224—76th Congress, 1st Session]

[S. 1796]

July 26, 1939, 53 Stat. 1083

[As amended by Public Resolution—No. 88—76th Congress, 3d Session]

[H. J. Res. 544]

June 26, 1940, 54 Stat. 611

[As amended by Public—No. 184—77th Congress, 1st Session]

[H. R. 2097]

July 18, 1941, 55 Stat. 599

[As amended by Public—No. 306—77th Congress, 1st Session]

[H. R. 4961]

November 21, 1941, 55 Stat. 775

An Act to improve the navigability and to provide for the
108 flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This Act may

be cited as the "Tennessee Valley Authority Act of 1933." [48 Stat. 58–59.]*

109 SEC. 2. (a) The board of directors of the Corporation (hereinafter referred to as the "board") shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and employees shall be designated and selected by the board.

(b) The terms of office of the members first taking office after the approval of this Act shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year, and one at the end of the ninth year, after the date of approval of this Act. A successor to a member of the board shall be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

(c) Any member appointed to fill a vacancy in the board occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(d) Vacancies in the board so long as there shall be two members in office shall not impair the powers of the board to execute the functions of the Corporation, and two of the members in office shall constitute a quorum for the transaction of the business of the board.

(e) Each of the members of the board shall be a citizen
110 of the United States, and shall receive a salary at the rate of $10,000 a year, to be paid by the Corporation as current expenses. Each member of the board, in addition to his salary, shall be permitted to occupy as his residence one of the dwelling houses owned by the Government in the vicinity of Muscle Shoals, Alabama, the same to be designated by the President of the United States. Members of the board shall be reimbursed by the Corporation for actual expenses (including traveling and subsistence expenses) incurred by them in the performance of the duties vested in the board by this Act. No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

NOTE.—For the purpose of identifying the sections which appeared in the original act of 1933 and those which have been brought into the act by amendment, references have been placed at the end of the sections. For example, the reference at the end of section 1, 48 Stat. 58–59, indicates that this section will be found in volume 48 of the Statutes at Large on pages 58 to 59. All sections will be found in volumes 48, 49, 53, 54, and 55 of the Statutes at Large as indicated.

(f) No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

(g) The board shall direct the exercise of all the powers of the Corporation.

(h) All members of the board shall be persons who profess a belief in the feasibility and wisdom of this Act. [48 Stat. 59.]

SEC. 3. The board shall without regard to the provisions
111 of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents, as are necessary for the transaction of its business, fix their compensation, define their duties, require bonds of such of them as the board may designate, and provide a system of organization to fix responsibility and promote efficiency. Any appointee of the board may be removed in the discretion of the board. No regular officer or employee of the Corporation shall receive a salary in excess of that received by the members of the board.

All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreement by representatives of employers and employees.

Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.

112 Insofar as applicable, the benefits of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, as amended, shall extend to persons given employment under the provisions of this Act. [48 Stat. 59–60.]

SEC. 4. Except as otherwise specifically provided in this Act, the Corporation—

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safekeeping of the securities and moneys of the said Corporation as the board may require: Provided, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of
113 America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings [48 Stat. 60–61]: Provided, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. [49 Stat. 1075].

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct powerhouses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system. [48 Stat. 61, as amended by 49 Stat. 1075].

(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, that no transfer authorized herein in (b) shall be made without the approval of Congress: And provided further, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or otherwise, to the Ingalls Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: Provided, however, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority, except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: And provided further, That no trans-

fer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order
116 to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President. [49 Stat. 1076, as amended by 55 Stat. 599–600.]

(1) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. [49 Stat. 1080].

SEC. 5. The board is hereby authorized—

(a) To contract with commercial producers for the production of such fertilizers of fertilizer materials as may be needed in the Government's program of development and introduction in excess of that produced by Government plants. Such contracts may provide either for outright purchase of materials by the board or only for the payment of carrying charges on special materials manufactured at the board's request for its program.

(b) To arrange with farmers and farm organizations for
117 large-scale practical use of the new forms of fertilizers under conditions permitting an accurate measure of the economic return they produce. [48 Stat. 61.]

(c) To cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners, for the use of new forms of fertilizer or fertilizer practices during the initial or experimental period of their introduction, and for promoting the prevention of soil erosion by the use of fertilizers and otherwise. [48 Stat. 61, as amended by 49 Stat. 1076.]

(d) The board in order to improve and cheapen the production of fertilizer is authorized to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients at Muscle Shoals by the em-

ployment of existing facilities, by modernizing existing plants, or by any other process or processes that in its judgment shall appear wise and profitable for the fixation of atmospheric nitrogen or the cheapening of the production of fertilizer.

(e) Under the authority of this Act the board may make donations or sales of the product of the plant or plants operated by it to be fairly and equitably distributed through the agency of county demonstration agents, agricultural colleges, or otherwise as the board may direct, for experimentation, education, and introduction of the use of such products in cooperation with practical farmers so as to obtain information as to the value, effect, and best methods of their use.

118 (f) The board is authorized to make alterations, modifications, or improvements in existing plants and facilities, and to construct new plants.

(g) In the event it is not used for the fixation of nitrogen for agricultural purposes or leased, then the board shall maintain in stand-by condition nitrate plant numbered 2, or its equivalent, for the fixation of atmospheric nitrogen, for the production of explosives in the event of war or a national emergency, until the Congress shall by joint resolution release the board from its obligation, and if any part thereof be used by the board for the manufacture of phosphoric acid or potash, the balance of nitrate plant numbered 2 shall be kept in stand-by condition.

(h) To establish, maintain, and operate laboratories and experimental plants, and to undertake experiments for the purpose of enabling the Corporation to furnish nitrogen products for military purposes, and nitrogen and other fertilizer products for agricultural purposes in the most economical manner and at the highest standard of efficiency.

(i) To request the assistance and advice of any officer, agent, or employee of any executive department or of any independent office of the United States, to enable the Corporation the better to carry out its powers successfully, and as far as practicable shall utilize the services of such officers, agents, and employees, and the President shall, if in his opinion, the public interest, service, or economy so require, direct that such assistance, advice, and service be rendered to the Corporation, and any individual

119 that may be by the President directed to render such assistance, advice, and service shall be thereafter subject to the orders, rules, and regulations of the board: Provided, That any invention or discovery made by virtue of and incidental to such service by an employee of the Government of the United States serving under this section, or by any employee of the Corporation, together with any patents which may be granted thereon, shall be the sole and exclusive property of the Corporation, which is

hereby authorized to grant such licenses thereunder as shall be authorized by the board: Provided further, That the board may pay to such inventor such sum from the income from sale of licenses as it may deem proper.

(j) Upon the requisition of the Secretary of War or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.

(k) Upon the requisition of the Secretary of War the Corporation shall allot and deliver without charge to the War Department so much power as shall be necessary in the judgment of said Department for use in operation of all locks, lifts, or other facilities in aid of navigation.

(l) To produce, distribute, and sell electric power, as herein particularly specified.

(m) No products of the Corporation shall be sold for use outside of the United States, its Territories and possessions, except to the United States Government for the use of its Army and Navy, or to its allies in case of war.

(n) The President is authorized, within twelve months
120 after the passage of this Act, to lease to any responsible farm organization or to any corporation organized by it nitrate plant numbered 2 and Waco Quarry, together with the railroad connecting said quarry with nitrate plant numbered 2, for a term not exceeding fifty years at a rental of not less than $1 per year, but such authority shall be subject to the express condition that the lessee shall use said property during the term of said lease exclusively for the manufacture of fertilizer and fertilizer ingredients to be used only in the manufacture of fertilizer by said lessee and sold for use as fertilizer. The said lessee shall covenant to keep said property in first-class condition, but the lessee shall be authorized to modernize said plant numbered 2 by the installation of such machinery as may be necessary, and is authorized to amortize the cost of said machinery and improvements over the term of said lease or any part thereof. Said lease shall also provide that the board shall sell to the lessee power for the operation of said plant at the same schedule of prices that it charges all other customers for power of the same class and quantity. Said lease shall also provide that, if the said lessee does not desire to buy power of the publicly owned plant, it shall have the right to purchase its power for the operation of said plant of the Alabama Power Company or any other publicly or privately owned corporation engaged in the generation and sale of electric power, and in such case the lease shall provide further that the said lessee shall have a free right of way to build a trans-
mission line over Government property to said plant paying
121 the actual expenses and damages, if any, incurred by the

Corporation on account of such line. Said lease shall also provide that the said lessee shall covenant that during the term of said lease the said lessee shall not enter into any illegal monopoly, combination, or trust with any privately owned corporation engaged in the manufacture, production, and sale of fertilizer with the object or effect of increasing the price of fertilizer to the farmer. [48 Stat. 61–63.]

SEC. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board. [48 Stat. 63.]

SEC. 7. In order to enable the Corporation to exercise the powers and duties vested in it by this Act—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama, together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and
122 plants used as auxiliaries thereto; the fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Number 2, located at Muscle Shoals, its powerhouse, and all hydroelectric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are hereby intrusted to the Corporation for the purposes of this Act.

(b) The President of the United States is authorized to provide for the transfer to the Corporation of the use, possession, and control of such other real or personal property of the United States as he may from time to time deem necessary and proper for the purposes of the Corporation as herein stated. [48 Stat. 63.]

SEC. 8. (a) The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits.

(b) The Corporation shall at all times maintain complete and accurate books of accounts.

(c) Each member of the board, before entering upon the duties of his office, shall subscribe to an oath (or affirmation) to support the Constitution of the United States and to faithfully and
123 impartially perform the duties imposed upon him by this Act. [48 Stat. 63.]

SEC. 9. (a) The board shall file with the President and with Congress, in December of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year. This report shall include an itemized statement of the cost of power at each power station, the total number of employees and the names, salaries, and duties of those receiving compensation at the rate of more than $1,500 a year. [47 Stat. 63.]

(b) All purchases and contracts for supplies or services, except for personal services, made by the Corporation shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: Provided, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $500; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: Provided further, That in comparing bids and in making awards the Board
124 may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

The Comptroller General of the United States shall audit the transactions of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property, and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transac-

tions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: Provided, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for
125 each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. The Comptroller General shall make special report to the President of the United States and to the Congress of any transaction or condition found by him to be in conflict with the powers or duties entrusted to the Corporation by law. [48 Stat. 64–64, as amended by 49 Stat. 1080–1081.]

Nothing in this Act shall be construed to relieve the Treasurer or other accountable officers or employees of the Corporation from compliance with the provisions of existing law requiring the rendition of accounts for adjustment and settlement pursuant to section 236, Revised Statutes, as amended by section 305 of the Budget and Accounting Act, 1921 (42 Stat. 24), and accounts for all receipts and disbursements by or for the Corporation shall be rendered accordingly: Provided, That, subject only to the provisions of the Tennessee Valley Authority Act of 1933, as amended, the Corporation is authorized to make such expenditures and to enter into such contracts, agreements, and arrangements, upon such terms and conditions and in such manner as it may deem necessary, including the final settlement of all claims and litigation by or against the Corporation; and, notwithstanding the provisions of any other law governing the expenditure of public funds, the General Accounting Office, in the settlement of the accounts
126 of the Treasurer or other accountable officer or employee of the Corporation, shall not disallow credit for, nor withhold funds because of, any expenditure which the Board shall determine to have been necessary to carry out the provisions of said Act.

The Corporation shall determine its own system of administrative accounts and the forms and contents of its contracts and other business documents except as otherwise provided in the Tennessee Valley Authority Act of 1933, as amended. [55 Stat. 775–776.]

SEC. 9a. The Board is hereby directed in the operation of any

dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority. [49 Stat. 1076.]

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States,
127 counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: Provided, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: Provided further, That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State govern-
128 ments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region [48

Stat. 64]: Provided further, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: Provided further, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages. And provided further, That the terms "States," "counties," and "municipalities" as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction. [49 Stat. 1076.]

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission distance. This policy is further declared to be that the projects herein provided for
129 shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act. [48 Stat. 64–65.]

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board:

Provided, That if any State, county, municipality, or other
130 public or cooperative organization of citizens or farmers,
not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to contract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county, municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: Provided further, That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer
or user by the municipality or other political subdivision
131 or cooperative organization: And provided further, That as
to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: And provided further, That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or break-down relief. [48 Stat. 65–66.]

SEC. 12a. In order (1) to facilitate the disposition of the surplus power of the Corporation according to the policies set forth

in this Act; (2) to give effect to the priority herein accorded to States, counties, municipalities, and nonprofit organizations in the purchase of such power by enabling them to acquire facilities for the distribution of such power; and (3) at the same time to preserve existing distribution facilities as going concerns and avoid duplication of such facilities, the Board is authorized to advise
132 and cooperate with and assist, by extending credit for a period of not exceeding five years to, States, counties, municipalities and nonprofit organizations situated within transmission distance from any dam where such power is generated by the Corporation in acquiring, improving, and operating (a) existing distribution facilities and incidental works, including generating plants; and (b) interconnecting transmission lines; or in acquiring any interest in such facilities, incidental works, and lines. [49 Stat. 1076–1077.]

SEC. 13. In order to render financial assistance to those States and local governments in which the power operations of the Corporation are carried on and in which the Corporation has acquired properties previously subject to State and local taxation, the board is authorized and directed to pay to said States, and the counties therein, for each fiscal year, beginning July 1, 1940, the following percentages of the gross proceeds derived from the sale of power by the Corporation for the preceding fiscal year as hereinafter provided, together with such additional amounts as may be payable pursuant to the provisions hereinafter set forth, said payments to constitute a charge against the power operations of the Corporation: For the fiscal year (beginning July 1) 1940, 10 per centum; 1941, 9 per centum; 1942, 8 per centum; 1943, 7½ per centum; 1944, 7 per centum; 1945, 6½ per centum; 1946, 6 per centum; 1947, 5½ per centum; 1948 and each fiscal year thereafter, 5 per centum. "Gross proceeds," as used in this section, is defined as the total gross proceeds derived by the Corporation from
133 the sale of power for the preceding fiscal year, excluding power used by the Corporation or sold or delivered to any other department or agency of the Government of the United States for any purpose other than the resale thereof. The payments herein authorized are in lieu of taxation, and the Corporation, its property, franchises, and income, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision or district thereof.

The payment for each fiscal year shall be apportioned among said States in the following manner: One-half of said payments shall be apportioned by paying to each State the percentage thereof which the gross proceeds of the power sales by the Corporation within said State during the preceding fiscal year bears to the total gross proceeds from all power sales by the Corporation dur-

ing the preceding fiscal year; the remaining one-half of said payment shall be apportioned by paying to each State the percentage thereof which the book value of the power property held by the Corporation within said State at the end of the preceding fiscal year bears to the total book value of all such property held by the Corporation on the same date. The book value of power property shall include that portion of the investment allocated or estimated to be allocable to power: Provided, That the minimum annual payment to each State (including payments to counties therein) shall not be less than an amount equal to the two-year average of the State and local ad valorem property
134 taxes levied against power property purchased and operated by the Corporation in said State and against that portion of reservoir lands related to dams constructed by or on behalf of the United States Government and held or operated by the Corporation and allocated or estimated to be allocable to power. The said two-year average shall be calculated for the last two tax years during which said property was privately owned and operated or said land was privately owned: Provided further, That the minimum annual payment to each State in which the Corporation owns and operates power property (including payments to counties therein) shall not be less than $10,000 in any case: Provided further, That the corporation shall pay directly to the respective counties the two-year average of county ad valorem property taxes (including taxes levied by taxing districts within the respective counties) upon power property and reservoir lands allocable to power, determined as above provided, and all payments to any such county within a State shall be deducted from the payment otherwise due to such State under the provisions of this section. The determination of the board of the amounts due hereunder to the respective States and counties shall be final.

The payments above provided shall in each case be made to the State or county in equal monthly installments beginning not later than July 31, 1940.

Nothing herein shall be construed to limit the authority of the Corporation in its contracts for the sale of power to municipalities, to permit or provide for the resale of power at rates which
135 may include an amount to cover tax-equivalent payments to the municipality in lieu of State, county, and municipal taxes upon any distribution system or property owned by the municipality, or any agency thereof, conditioned upon a proper distribution by the municipality of any amounts collected by it in lieu of State or county taxes upon any such distribution system or property; it being the intention of Congress that either the municipality or the State in which the municipality is situated shall provide for the proper distribution to the State and county

of any portion of tax equivalent so collected by the municipality in lieu of State or county taxes upon any such distribution system or property.

The Corporation shall, not later than January 1, 1945, submit to the Congress a report on the operation of the provisions of this section, including a statement of the distribution to the various States and counties hereunder; the effect of the operation of the provisions of this section on State and local finances; an appraisal of the benefits of the program of the Corporation to the States and counties receiving payments hereunder, and the effect of such benefits in increasing taxable values within such States and counties; and such other data, information, and recommendations as may be pertinent to future legislation. [48 Stat. 66, as amended by 54 Stat. 626–627.]

SEC. 14. The board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants
136 at nitrate plant numbered 1, and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam plants, or other similar improvements hereafter constructed and turned over to said board for the purpose of control and management shall be ascertained and allocated. [48 Stat. 66.]

The Board shall, on or before January 1, 1937, file with Congress a statement of its allocation of the value of all such properties turned over to said Board, and which have been completed prior to the end of the preceding fiscal year, and shall thereafter in its annual report to Congress file a statement of its allocation of the value of such properties as have been completed during the preceding fiscal year.

For the purpose of accumulating data useful to the Congress in the formulation of legislative policy in matters relating to the generation, transmission, and distribution of electric energy and the production of chemicals necessary to national defense and useful in agriculture, and to the Federal Power Commission and other Federal and State agencies, and to the public, the
137 Board shall keep complete accounts of its costs of generation, transmission, and distribution of electric energy and shall keep a complete account of the total cost of generating and

transmission facilities constructed or otherwise acquired by the Corporation, and of producing such chemicals, and a description of the major components of such costs according to such uniform system of accounting for public utilities as the Federal Power Commission has, and if it have none, then it is hereby empowered and directed to prescribe such uniform system of accounting, together with records of such other physical data and operating statistics of the Authority as may be helpful in determining the actual cost and value of services, and the practices, methods, facilities, equipment, appliances, and standards and sizes, types, location, and geographical and economic integration of plants and systems best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy. Such data shall be reported to the Congress by the Board from time to time with appropriate analyses and recommendations, and, so far as practicable, shall be made available to the Federal Power Commission and other Federal and State agencies which may be concerned with the administration of legislation relating to the generation, transmission, or distribution of electric energy and chemicals useful to agriculture. It is hereby declared to be the policy of this Act that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating, the surplus power shall be sold at rates which, in the opinion of the
138 Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power and in addition to the statement of the cost of power at each power station as required by section 9 (a) of the "Tennessee Valley Act of 1933," the Board shall file with each annual report a statement of the total cost of all power generated by it at all power stations during each year, the average cost of such power per kilowatt hour, the rates at which sold, and to whom sold, and copies of all contracts for the sale of power. [49 Stat. 1077.]

SEC. 15. In the construction of any future dam, steam plant, or other facility, to be used in whole or in part for the generation or transmission of electric power the board is hereby authorized and empowered to issue on the credit of the United States and to sell serial bonds not exceeding $50,000,000 in amount, having a maturity not more than fifty years from the date of issue thereof, and bearing interest not exceeding 3½ per centum per annum. Said bonds shall be issued and sold in amounts and prices approved by the Secretary of the Treasury, but all such bonds as may be so issued and sold shall have equal rank. None of said bonds shall be sold below par, and no fee, commission, or compensation whatever shall be paid to any person, firm, or corpora-

tion for handling, negotiating the sale, or selling the said bonds. All of such bonds so issued and sold shall have all the rights and privileges accorded by law to Panama Canal bonds author-
139 ized by section 8 of the Act of June 28, 1902, chapter 1302, as amended by the Act of December 21, 1905 (ch. 3, sec. 1, 34 Stat. 5) as now compiled in section 743 of title 31 of the United States Code. All funds derived from the sale of such bonds shall be paid over to the Corporation. [48 Stat. 66–67.]

SEC. 15a. With the approval of the Secretary of the Treasury the Corporation is authorized to issue bonds not to exceed in the aggregate $50,000,000 outstanding at any one time, which bonds may be sold by the Corporation to obtain funds to carry out the provisions of section 12a of this Act. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ percentum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury: Provided, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fi-
140 duciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds

of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. No bonds shall be issued hereunder to provide funds
141 or bonds necessary for the performance of any proposed contract negotiated by the Corporation under the authority of section 12a of this Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds hereunder shall expire at the end of five years from the date when this section as amended herein becomes law, except that such bonds may be issued at any time after the expiration of said period to provide bonds or funds necessary for the performance of any contract entered into by the Corporation, prior to the expiration of said period, under the authority of section 12a of this Act. [49 Stat. 1078.]

SEC. 15b. No bonds shall be issued by the Corporation after the date of enactment of this section under section 15 or section 15a.

SEC. 15c. With the approval of the Secretary of the Treasury the Corporation is authorized, after the date of enactment of this section, to issue bonds not to exceed in the aggregate $61,500,000. Such bonds may be sold by the Corporation to obtain funds which may be used for the following purposes only:

(1) Not to exceed $46,000,000 may be used for the purchase of electric utility properties of the Tennessee Electric Power Company and Southern Tennessee Power Company, as contemplated in the contract between the Corporation and the
142 Commonwealth and Southern Corporation and others, dated as of May 12, 1939.

(2) Not to exceed $6,500,000 may be used for the purchase and rehabilitation of electric utility properties of the Alabama Power Company and Mississippi Power Company in the following named counties in northern Alabama and northern Mississippi: The counties of Jackson, Madison, Limestone, Lauderdale, Colbert, Lawrence, Morgan, Marshall, De Kalb, Cherokee, Cullman, Winston, Franklin, Marion, and Lamar in northern Alabama, and the counties of Calhoun, Chickasaw, Monroe, Clay, Lowndes, Oktibbeha, Choctaw, Webster, Noxubee, Winston, Neshoba and Kemper in northern Mississippi.

(3) Not to exceed $3,500,000 may be used for rebuilding, replacing, and repairing electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section.

(4) Not to exceed $3,500,000 may be used for constructing electric transmission lines, substations, and other electrical facilities necessary to connect the electric utility properties purchased by the Corporation in accordance with the foregoing provisions of this section with the electric power system of the Corporation.

(5) Not to exceed $2,000,000 may be used for making loans under section 12a to States, counties, municipalities, and nonprofit organizations to enable them to purchase any electric utility properties referred to in the contract between the Corporation and the Commonwealth and Southern Corporation and others,
143 dated as of May 12, 1939, or any electric utility properties of the Alabama Power Company or Mississippi Power Company in any of the counties in northern Alabama or northern Mississippi named in paragraph (2).

The Corporation shall file with the President and with the Congress in December of each year a financial statement and complete report as to the expenditure of funds derived from the sale of bonds under this section covering the period not covered by any such previous statement or report. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation with the approval of the Secretary of the Treasury: Provided, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public
144 funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treas-

ury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. None of the proceeds of the bonds shall be used for the performance of any proposed contract negotiated by the Corporation under the authority of section
145 12a of this Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds under this section shall expire January 1, 1941, except that if at the time such authority expires the amount of bonds issued by the Corporation under this section is less than $61,500,000, the Corporation may, subject to the foregoing provisions of this section, issue, after the expiration of such period, bonds in an amount not in excess of the amount by which the bonds so issued prior to the expiration of such period is less than $61,500,000, for refunding purposes, or, subject to the provisions of paragraph (5) of this section (limiting the purposes for which loans under section 12a of funds derived from bond proceeds may be made) to provide funds found necessary in the performance of any contract entered into by the Corporation prior to the expiration of such period, under the authority of section 12a. [53 Stat. 1083–1085.]

SEC. 16. The board, whenever the President deems it advisable, is hereby empowered and directed to complete Dam Numbered 2 at Muscle Shoals, Alabama, and the steam plant at nitrate plant numbered 2, in the vicinity of Muscle Shoals, by installing in Dam Numbered 2 the additional power units according to the plans and specifications of said dam, and the
146 additional power unit in the steam plant at nitrate plant numbered 2. [48 Stat. 67.]

SEC. 17. The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct, either directly or by contract to the lowest responsible bidder, after due advertisement, a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be developed at Dam Numbered 2 and at any and all other dams below the said Cove Creek Dam: Provided, however, That the President is hereby authorized by appropriate order to direct the employment by the Secretary of War, or by the Secretary of the Interior, of such engineer or engineers as he may designate, to perform such duties and obligations as he may deem proper, either in the drawing of plans and specifications for said dam, or to perform any other work in the building or construction of the same. The President may, by such order, place the control of the construction of said dam in the hands of such engineer or engineers taken from private life as he may desire: And pro-
147 vided further, That the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the Tennessee River Basin, or in the authorization of any improvement therein, there has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights. [48 Stat. 67.]

SEC. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and

conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other
148 person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam, transmission line, and powerhouse shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River. [48 Stat. 67–68.]

SEC. 19. The Corporation, as an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers, shall have access to the Patent Office of the United States for the purpose of studying, ascertaining, and copying all methods, formulae, and scientific information (not including access to pending applications for patents) necessary to enable the Corporation to use and employ the most efficacious and economical process for the production of fixed nitrogen, or any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydro-electric power, and any owner of a patent whose patent rights may have been thus in any way copied, used, infringed, or employed by the exercise of this authority by the Corporation shall have as the exclusive remedy a cause of action against the Corporation to be instituted and prosecuted on the equity side of the appropriate district court of the United States, for the recovery of reasonable compensation
149 for such infringement. The Commissioner of Patents shall furnish to the Corporation, at its request and without payment of fees, copies of documents on file in his office: Provided, That the benefits of this section shall not apply to any art, machine, method of manufacture, or composition of matter, discovered or invented by such employee during the time of his employment or service with the Corporation or with the Government of the United States. [48 Stat. 68.]

SEC. 20. The Government of the United States hereby reserves the right, in case of war or national emergency declared by Congress, to take possession of all or any part of the property described or referred to in this Act for the purpose of manufacturing explosives or for other war purposes; but, if this right is exercised by the Government, it shall pay the reasonable and fair damages that may be suffered by any party whose contract for the purchase of electric power or fixed nitrogen or fertilizer ingredients is hereby violated, after the amount of the damages has been fixed by the

United States Court of Claims in proceedings instituted and conducted for that purpose under rules prescribed by the court. [48 Stat. 68.]

SEC. 21. (a) All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use, or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

150 (b) Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United States (1) makes any false entry in any book of the Corporation, or (2) makes any false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than $5,000 or imprisoned not more than five years, or both. [48 Stat. 68–69.]

SEC. 22. To aid further the proper use, conservation, and development of the national resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act, and to provide for the general welfare of the citizens of said areas, the President is hereby authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expendi-

151 ture of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end. [48 Stat. 69.]

SEC. 23. The President shall, from time to time, as the work provided for in the preceding section progresses, recommend to Congress such legislation as he deems proper to carry out the

general purposes stated in said section, and for the especial purpose of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin. [48 Stat. 69.]

SEC. 24. For the purpose of securing any rights of flowage, or obtaining title to or possession of any property, real or personal, that may be necessary or may become necessary, in the carrying out of any of the provisions of this Act, the President of the United States for a period of three years from
152 the date of the enactment of this Act, is hereby authorized to acquire title in the name of the United States to such rights or such property, and to provide for the payment for same by directing the board to contract to deliver power generated at any of the plants now owned or hereafter owned or constructed by the Government or by said Corporation, such future delivery of power to continue for a period not exceeding thirty years. Likewise, for one year after the enactment of this Act, the President is further authorized to sell or lease any parcel or part of any vacant real estate now owned by the Government in said Tennessee River Basin, to persons, firms, or corporations who shall contract to erect thereon factories or manufacturing establishments, and who shall contract to purchase of said Corporation electric power for the operation of any such factory or manufacturing establishment. No contract shall be made by the President for the sale of any of such real estate as may be necessary for present or future use on the part of the Government for any of the purposes of this Act. Any such contract made by the President of the United States shall be carried out by the Board: Provided, That no such contract shall be made that will in any way abridge or take away the preference right to purchase power given in this Act to States, counties, municipalities, or farm organizations: Provided further, That no lease shall be for a term to exceed fifty years: Provided further, That any sale shall be on condition that said land shall be used for industrial purposes only. [48 Stat. 69–70.]

153 SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court

for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed $15 for their services, together with an additional amount of $5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into
154 the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpoena witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

In the event of any property owned in whole or in part by minors, or insane persons, or incompetent persons, or estates of deceased persons, then the legal representatives of such minors, insane persons, incompetent persons, or estates shall have power, by and with the consent and approval of the trial judge in whose court said matter is for determination, to consent to or reject the awards of the commissioners herein provided for, and in the event that there be no legal representatives, or that the legal representatives for such minors, insane persons, or incompetent persons shall fail or decline to act, then such trial judge may, upon motion, appoint a guardian ad litem to act for such minors, insane persons, or incompetent persons, and such guardian ad litem shall act to the full extent and to the same purpose and effect as his ward could act, if competent, and such guardian ad litem shall be deemed to have full power and authority to respond, to conduct, or to maintain any proceeding herein provided for affecting his said ward. [48 Stat. 70–71.]

SEC. 26. Commencing July 1, 1936, the proceeds for each fiscal year derived by the Board from the sale of power or any other products manufactured by the Corporation, and from any other activities of the Corporation including the disposition of any real

or personal property, shall be paid into the Treasury of the United States at the end of each calendar year, save and except such part of such proceeds as in the opinion of the Board shall be necessary for the Corporation in the operation of dams and reservoirs, in conducting its business in generating, transmitting, and distributing electric energy and in manufacturing, selling, and distributing fertilizer and fertilizer ingredients. A continuing fund of $1,000,000 is also excepted from the requirements of this section and may be withheld by the Board to defray
157 emergency expenses and to insure continuous operation: Provided, That nothing in this section shall be construed to prevent the use by the Board, after June 30, 1936, of proceeds accruing prior to July 1, 1936, for the payment of obligations lawfully incurred prior to such latter date. [48 Stat. 71, as amended by 49 Stat. 1079.]

SEC. 26a. The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

In the event the Board shall, within sixty days after their formal submission to the Board, fail to approve any plans or modifications, as the case may be, for construction, operation, or maintenance of any such structures on the Little Tennessee River, the above requirements shall be deemed satisfied, if upon application to the Secretary of War, with due notice to the
158 Corporation, and hearing thereon, such plans or modifications are approved by the said Secretary of War as reasonably adequate and effective for the unified development and regulation of the Tennessee River system.

Such construction, commencement of construction, operation, or maintenance of any structures or parts thereof in violation of the provisions of this section may be prevented, and the removal or discontinuation thereof required by the injunction or order of any district court exercising jurisdiction in any district in which such structures or parts thereof may be situated, and the Corporation is hereby authorized to bring appropriate proceedings to this end.

The requirements of this section shall not be construed to be a substitute for the requirements any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of this section. [49 Stat. 1079.]

SEC. 27. All appropriations necessary to carry out the provisions of this Act are hereby authorized. [48 Stat. 71.]

SEC. 28. That all Acts or parts of Acts in conflict herewith are hereby repealed, so far as they affect the operations contemplated by this Act. [48 Stat. 71.]

159 SEC. 29. The right to alter, amend, or repeal this Act is hereby expressly declared and reserved, but no such amendment or repeal shall operate to impair the obligation of any contract made by said Corporation under any power conferred by this Act. [48 Stat. 72.]

SEC. 30. That the sections of this Act are hereby declared to be separable, and in the event of any one or more sections of this Act, or parts thereof, be held to be unconstitutional, such holding shall not affect the validity of other sections or parts of this Act. [48 Stat. 72, as amended by 49 Stat. 1081.]

SEC. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: Provided, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4 (k) of this Act. [49 Stat. 1080.]

163 In the United States Circuit Court of Appeals
for the Fourth Circuit

Nos. 5373–5378

No. 5373

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

S. COLUMBUS WELCH

No. 5374

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

JOHN BURNS, ET AL.

No. 5375

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

FRED LOLLIS, ET AL.

No. 5376

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

ARNOLD E. BRADSHAW, ET AL.

No. 5377

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

PHILIP G. RUST, ET AL.

No. 5378

UNITED STATES OF AMERICA, EX. REL. TENNESSEE VALLEY AUTHORITY

v.

ABRAHAM COLE HYATT, ET AL.

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

APPENDIX TO BRIEF FOR APPELLEES

164 TESTIMONY BEFORE THE DISTRICT COURT

ROBERT E. FRIERSON, for Petitioner

ON CROSS EXAMINATION

Q. Mr. Frierson, I believe you just have a map there before you now that has been offered in evidence and handed up to the Court that shows tract FR-1092?—A. Yes, sir.

Q. You have that map with you do you?—A. Yes, sir.

Q. Now, Mr. Frierson, the impounded waters on the Fontana Dam only cover about a tenth of an acre of that land, a little down at the lower tip, isn't it?—A. About an acre and a half.

Q. You mean you flood an acre and a half?—A. An acre and six-tenths to be exact, the way we figure it.

Q. You measured that?—A. Yes, sir.

Q. And that's the part that the respondent agrees to make a deed to the government for. You understand that, don't you?—A. I understand you to say so, sir. (Tr., 54-55.)

* * * * *

Q. Now they don't intend to keep that land. The T. V. A. doesn't intend to keep that boundary of land or to use that boundary of land in connection with the Fontana Dam, does it?—A. No; they don't intend to keep it.

Q. Now, they are going to let somebody else have it. That's true, isn't it?—A. That's correct. (Tr., 61.)

* * * * *

By the COURT:

Q. Was that the understanding between the T. V. A. and
165 the Park Service, that you should condemn or buy this land and then transfer it to the Park, Mr. Frierson? Was that the understanding?—A. Yes, sir. (Tr., 63.)

FRANK W. WEBSTER, for Petitioner

ON CROSS EXAMINATION

Q. Mr. Webster, you stated that in your experience with the T. V. A. in acquiring lands for roads, that one method they had was taking releases on property. Now you do know that the T. V. A. has accepted releases from landowners about a road or an access road to their property?—A. Yes, sir.

Q. And they consider that good—Now as a matter of fact, it has been introduced, Your Honor, in evidence, this contract—I will ask you, are you acquainted with this contract that you told His Honor about between the Government and the T. V. A. and the Interior Department?—A. Yes.

Q. You have read it?—A. Yes, sir.

Q. Well, now Mr. Webster, you know that in the contract there is excepted a boundary of land of about 1,900 acres within this area that you are talking about, within the 40,000 acres——

The COURT. 44,000 acres.

Within the 44,000 acres, that the T. V. A. is not required to get and turn over to the Park.—A. Yes, sir.

Q. Now, that is the land of the North Carolina Exploration Company?—A. Yes, sir. (Tr., 103–104.)

S. COLUMBUS WELCH, Respondent

ON DIRECT EXAMINATION

Q. Now Mr. Welch, in the pleadings that I have filed for you as your attorney in this Court, which you are acquainted
166 with, it it stated that you will release the state, county and government from any and all damage on account of closing a road or a way to get to your property.—A. That's right.

Q. You are willing to that?—A. Yes, sir.

Q. You will do that. It is further stated in the pleadings that about an acre or a quarter of an acre of Tract 1092 that is flooded by water, that you will make a deed——A. Yes, sir.

Q. To the United States Government, free.—A. Free.

Q. Deed them every bit of it. That in addition, you will execute any kind of a deed or instrument or authorize the Court in a judgment to release and relieve the United States Government, Tennessee Valley Authority, the State of North Carolina and the County of Swain, from any and all damage by reason of flooding a road or your access to this property?—A. Yes, sir.

Q. You further agree, Mr. Welch, by an amendment to your answer that I filed by permisison of Court today, to give and grant to the Department of the Interior, United States Department of the Interior, the United States Government, or the state, a right of way to build a road over this tract of land containing 163 acres?—A. Yes, sir.

Q. You will convey them that, you will agree that it be put in the judgment, you will do it free and without any charge?—A. Yes, sir. (Tr., 184–186.) [1]

[1] "Tr." refers to the paging of the transcript in Volume II of the record.

CROSS EXAMINATION

Q. Mr. Welch, do you understand that if you keep this property and the reservoir comes up, that you will have no way of getting to it or out of it by road at all? Do you understand that?—A. Yes; I understand that there won't be no road through it.

Q. And do you also understand that you have no
167 way of getting a road built to that property in the future?—A. No; I don't know of any.

Q. Well, are you relying upon some assumption that you are going to get a road built to that property if you keep it?—A. Well, I can get into it, I think.

Q. Well, now, just how?—A. Well, I can get into it on the water.

Q. Do you know anything about the drawdown in that lake, that is, the difference in the water level in that lake in different seasons of the year?—A. I don't——

Q. Has anybody explained that to you?—A. Well, it would be lower sometimes than others.

Q. Well, when the lake is way down low, how are you going to get, even by water, back and forth from your property to the lake without going on land that you don't own. (No answer from the witness.)

Q. You'd have to go on government property, wouldn't you?—A. Yeah.

Q. In order to get there even by water, when the lake is down. So I just want to be sure, do you understand that your situation, if you keep that property, is that you have no road there at all and can only get to it by water if you can get permission to go over property that somebody else owns?—A. Yeah; I understand that.

Q. Now what are you going to do with that land if you keep it?—A. Well, I want to keep it.

Q. What are you going to do with it?—A. Well, several things I could do with it. (Tr., 191–192.)

Agreement of July 30, 1943

This Agreement, made and entered into as of the 30th day of July 1943, by and between Tennessee Valley Authority (hereinafter called the "Authority"), a corporation created by an act of Congress known as the Tennessee Valley Authority Act of 1933; the State of North Carolina (hereinafter called the "State"), acting by and through its Governor, its council of State, and its
State Highway and Public Works Commission; Swain
168 County (hereinafter called the "County"), a political sub-

division of the State of North Carolina, acting by and through The Board of Commissioners for the County of Swain; and United States Department of the Interior (hereinafter called the "Department"), acting herein for the use and benefit of the National Park Service of said Department, witnesseth:

Whereas, the Authority, pursuant to the powers vested in it by the Tennessee Valley Authority Act of 1933, is engaged in the construction of a hydroelectric development, known as the Fontana project, consisting of a dam and reservoir on the Little Tennessee River in North Carolina, said dam being located approximately ten (10) miles upstream from the Tennessee-North Carolina State Line; and

Whereas, the Fornery Creek Road District has heretofore issued bonds for and constructed a road or highway extending from Deals Gap on the west to Bryson City on the east, said road following a course north of the Little Tennessee and Tuckasegee Rivers and south of the present southern boundary of the Great Smoky Mountains National Park (hereinafter referred to as the "Park"); and

Whereas, the County has heretofore assumed full liability for all principal of and interest on the bonds issued for the construction of said road as aforesaid, and in 1940 issued its own refunding bonds (and interest funding bonds) in the place of all such bonds then outstanding and unpaid; and

Whereas, the State has heretofore assumed jurisdiction
169 and control of said Deals Gap-Bryson City road, which is now known as North Carolina State Highway No. 288, and of all other public roads connecting therewith; and

Whereas, the reservoir to be constructed and operated by the Authority as a part of said Fontana Project will submerge, flood, or otherwise adversely affect a substantial portion of said Highway 288 east of the site of the Fontana Dam, together with other public roads connecting with said Highway 288; and

Whereas, the War Production Board has indicated that it would not approve or permit the reconstruction or relocation of said Highway 288 so long as the present war emergency and the shortage of labor, materials, and equipment resulting therefrom continue to exist; and

Whereas, said Highway 288 as now constructed does not furnish or afford a high standard of service, and it is recognized by the parties hereto that the reconstruction or relocation of said road on an equivalent basis after the war emergency or at any other future time would not constitute a wise or efficient expenditure of public funds; and

Whereas, there are now held in private ownership certain lands (hereinafter described in section 1 of this agreement) aggregating

approximately forty-four thousand four hundred (44,400) acres in area, located within the limits of the County south of the present southern boundary of the Park and north of Little Tennessee and Tuckasegee Rivers, all of which acreage (along with certain other acreage now in private ownership) was originally proposed for inclusion within the boundaries of the Park; and

170 Whereas, the acquisition of said land described in section 1 hereof by the United States of America and the inclusion thereof within the boundaries of the Park would serve to extend said boundaries substantially as originally contemplated, and would also establish a basis for the construction by the Department of a park standard road over and across said land; and

Whereas, the Department regards a park standard road connection between Deals Gap and Bryson City as an important link in a planned "around the Park" road, has included the same as a part of a Master Plan for the development of the Park (extended as aforesaid), and, subject to inclusion of the aforesaid additional acreage within the Park area, is agreeable to initiating construction of the Park portion of such a road as soon after the present war as funds are made available therefor by Congress; and

Whereas, the parties hereto desire to provide for and agree upon the extension of the Park boundaries as aforesaid, the closing and ultimate replacement of Highway 288, and the immediate and final settlement and disposition of all claims which the State and the County may at any time have against the Authority or the United States of America by reason of the flooding, taking, or closing of said Highway 288 and the other roads hereinafter described or referred to, all in the manner and upon the terms and conditions hereinafter specified, and all to the end and purpose of avoiding unwise and inefficient expenditures of public funds and of capturing certain benefits for the region affected and the public generally;

Now, therefore, in consideration of the premises and of the
171 mutual covenants and promises hereinafter contained, it is hereby mutually agreed by and between the parties hereto as follows:

1. Promptly upon the execution of this agreement, the authority shall, to the extent it has not already done so, in the name of the United States of America, commence and thereafter prosecute in a systematic, orderly, and diligent manner the acquisition by purchase, the exercise of eminent domain, or otherwise, of the land identified on the map attached to and hereby made a part of this agreement as Exhibit A as "Land Proposed for Transfer to U. S. Department of Interior," the land to be so acquired being more particularly described as follows:

All that land, except that part hereinafter excluded, lying in Swain County, North Carolina, on the north side of the Little Tennessee and Tuckasegee Rivers, and south of the Great Smoky Mountains National Park, extending from Twenty Mile Ridge on the west to the divide between Lands Creek and Peachtree Creek on the east, the east boundary of the area being approximately 2 miles west of Bryson City, North Carolina, the said area being bounded as follows:

(1) On the west and north by the present boundary line of the Great Smoky Mountains National Park;

(2) On the east by the divide between Lands Creek and Peachtree Creek (the nearest property line being the true boundary) but including the two tracts along the Tuckasegee River formerly owned by A. E. Lowe and A. L. and W. C. Nichols and acquired by the Authority from Nantahala Power and Light Company under tract designations FR–262 and FR–264;

(3) On the south by proposed Fontana Lake (1710 con-
172 tour) from the east boundary to a point on the edge of the lake approximately 3,600 feet as measured along the shore (1,710 contour) in a northerly direction from the axis of Fontana Dam; thence first with the north boundaries thence the west boundary of two tracts of land acquired by the Authority from Nantahala Power and Light Company and Carolina Aluminum Company, respectively, under tract designations FR–438 and FR–16 to a point 150 feet north of the center line of the principal access road to Fontana Dam and approximately 100 feet west of Lewellyn Branch; thence along a line parallel to and 150 feet north of said center line in a general westerly direction to an intersection with the boundary line of the Great Smoky Mountains National Park on the south and of Twenty Mile Ridge and east of Twenty Mile Creek.

Excepting and excluding from the area above defined (1) all those lands owned by the North Carolina Exploration Company, consisting of some three or four tracts of land situated in the Eagle Creek and Myers Branch watersheds and containing approximately 1,920 acres, more or less, and (2) all land upstream from Fontana Dam having the elevation of its present ground surface below the plane of the 1,710 foot (m. s. l.) contour.

The above described land contains a net total of approximately 44,400 acres, more or less.

Provided, however, that the Authority may at its election postpone the acquisition or the taking of any steps in connection with the acquisition of all or any part of or interest in the following property:

The tract of land owned by the North Carolina Mining Corporation situated on the north side of the Sugar Fork tributary

of Hazel Creek approximately 2 miles north of Proctor and being the tract of land conveyed by Walter S. Adams and wife, Melind, to the North Carolina Mining Corporation by deed dated March 29, 1901, and recorded in the Office of the Register of Deeds
173 of Swain County, North Carolina, in Deed Book 29, Page 238, the said tract containing 196 acres, more or less.

Until a date six months after the cessation of the hostilities in which the United States is now engaged, it being recognized by the parties hereto that the mining of said tract of land and the removal of such minerals as may be contained therein may be of importance to the prosecution of the war.

It is recognized and agreed that any or all of the lands acquired by the Authority under this section may be subject to outstanding rights of way, easements, and/or mineral rights; that any of said lands acquired from the Aluminum Company of America or any of its subsidiaries may be subject to rights of way one hundred fifty (150) feet in width for any transmission line or lines of any of said companies which may be constructed to interconnect any of the plants of said companies with the power system of the Authority, the location of such rights of way to be as agreed upon from time to time by said companies or any of them and the Authority; and that any of said lands acquired from Carolina Aluminum Company may be subject to any or all of the following perpetual rights, easements, and privileges in favor of Carolina Aluminum Company, its successors and assigns, as the owner or owners of the dam site of the Cheoah Development and as appurtenant thereto:

(2) The right of all times without limitation or restriction to flood by the waters of the reservoir impounded by the Cheoah Dam or any other dam erected on or near the site thereof, the said properties to an elevation of 1,276.63 feet above mean sea level and to flood said properties to such additional elevations as may result from wave action, floods, and other high water conditions.

(b) The right in the discretion of Carolina Aluminum
174 Company, its successors or assigns, to remove from the shore of Cheoah Reservoir and the land under said reservoir and to destroy or otherwise dispose of silt, drift, timber, vegetation, and other matter, and to use said shore and land for such purposes and any other purpose reasonably connected with the maintenance and operation of the Cheoah development, together with the right of ingress, egress, and regress for such purposes with tools, vehicles, and equipment across said properties.

It is further understood and agreed that in the purchase or other acquisition of the aforesaid land as herein provided, the Authority shall be privileged to follow and abide by its standard

policies and procedures, as the same may be varied or amended from time to time, pertaining to the acquisition of lands or interests therein. The Authority shall not be responsible and shall incur no liability under this section for any delay or delays in the acquisition of title to any of said land caused by or attributable to title searches or other studies, condemnation proceedings or other litigation, or caused by or attributable to any act or circumstance which is incident to or reasonably related to such acquisition or which is beyond the Authority's control, it being the intention of the parties that the Authority shall incur no liability for any delays in the acquisition of any land under this section resulting from any cause whatsoever other than the willful failure or refusal of the Authority to take any step necessary to effect such acquisition.

2. Immediately following its acquisition in accordance with section 1 hereof of all of the land described in said section, the Authority shall assign and transfer to the Department, for the use and benefit of the National Park Service and for inclusion as a part of the Park, the right of possession and all other right, title, and interest which the Authority may have in and to said land, and shall also grant to the Department, its agents, servants and invitees the right of access to and use of all lands of the United States in the Authority's custody lying upstream from Fontana Dam between the land to be transferred to the Department hereunder and low watermark on Fontana Lake, together with the right of access to and the use of the waters of said lake, for the purpose of constructing and maintaining thereon boating and recreational facilities, piers, docks, and related equipment, and of performing all other acts which may be reasonably necessary to the administration and use, as a part of the Park, of the lands to be transferred to the Department thereunder shall 2; provided, however, that said assignment, transfer, and grant shall be effected by an agreement of transfer between the Authority and the Department substantially in the form attached to and made a part hereof as Exhibit B, and shall be subject to all of the terms, conditions, provisions, exceptions, conclusions, and reservations contained in said Exhibit B, and shall also be subject to all those rights, easements, and interests (whether or not now listed or specified in said Exhibit B) which have been or may be reserved or left outstanding at the time of the Authority's acquisition of the lands described in section 1, as permitted or contemplated by said section 1; provided further that, prior to the execution of said transfer agreement, a metes and bounds description of the lands to be transferred to the Department thereunder shall be incorporated therein in substitution for the description of said

lands now contained in Exhibit B; and provided further that if the Authority shall at any time have acquired all of the land described in section 1, with the exception of all or of any part of or interest in the North Carolina Mining Corporation tract separately described in said section 1, the Authority and the Department shall then enter into an agreement of transfer, as aforesaid, with respect to so much of the land described in section 1 as the Authority shall then have acquired, and in such case said
176 North Carolina Mining Corporation tract, or the part thereof or interest therein not initially transferred by the Authority to the Department, shall be the subject of a separate and subsequent agreement of transfer between the Authority and the Department, such subsequent agreement of transfer to be consistent with the provisions of this agreement and substantially in the form attached hereto as Exhibit B, and to be executed immediately following the Authority's acquisition of the part of or interest in said tract not covered by the initial agreement of transfer.

The parties recognize and agree that, as an incident to the construction, maintenance, and operation of the Fontana project, the Authority will acquire certain lands and rights and interests in land in addition to those specified to be acquired under section 1 hereof and to be transferred under this section 2. The acquisition of such additional lands and rights and interests in land shall not give rise to any obligation on the part of the Authority to transfer the same, or any part thereof or interest therein, to the Department, and the Authority's sole obligation under sections 1 and 2 of this agreement shall be to the effect the acquisition of the lands specified in section 1 and to transfer the possession and control of said lands to the Department along with the additional rights of access and use specified in the preceding paragraph, all as herein specifically provided.

3. The Department agrees to enter into an agreement or agreements of transfer with the Authority as provided by Section 2 hereof, and, pursuant to and subject to the provisions of such agreement or agreements, to accept an assignment and transfer of the lands described in section 1 hereof, together with the additional rights of access and use specified in section 2. The department further agrees that, forthwith upon the execution and delivery of such an agreement of transfer, it will extend the present boundaries of the Park to embrace and include the land transferred hereby.

177 4. The department represents and states that it has evolved a Master Plan for the development, of the Park as extended by the addition of the lands described in section

1 hereof, and that said Master Plan includes an "around the Park" road, of which the Park section of a projected road between Deals Gap and Bryson City constitutes an important link. Subject to the transfer by the Authority to the Department of the land described in section 1 as herein provided, the Department agrees that, as soon as funds are made available for that purpose by Congress after the cessation of the hostilities in which the United States is now engaged, the Department will construct or cause to be constructed the following described sections of road, all of said sections being hereinafter collectively referred to as the "Park Road";

(a) A section or road beginning at a point on the Fontana Dam Access Road near the crossing of Fax Branch, and extending to a point on the western boundary of the land identified on Exhibit A as the property of North Carolina Exploration Company.

(b) A section of road beginning at the eastern boundary of said North Carolina Exploration Company land and extending to the eastern boundary of the Park as extended hereunder.

(c) A section of road across said North Carolina Exploration Company land connecting the ends of the sections of road described in paragraphs (a) and (b) above.

(d) A section of road beginning at a point in the road described in paragraph (a) above, and extending in a generally southerly direction to the west abutment of Fontana Dam.

Provided, however, that in lieu of the sections of road
178 described in paragraphs (a), (b), and (c), above, the Department may at its election construct or cause to be constructed, as a part of the Park Road, a continuous section of road beginning at a point on the Fontana Dam Access Road near the crossing of Fax Branch and extending around the aforesaid property of the North Carolina Exploration Company (through existing Park lands) to the eastern boundary of the Park as extended hereunder. In the event of such election on the part of the Department, the Department shall nevertheless construct or cause to be constructed, as a part of the Park Road, the section of road described in paragraph (d) above, which section shall in such case commence on said alternative section of Park Road at a point west of the lands identified on Exhibit A as the property of North Carolina Exploration Company. Upon commencement of construction of the Park Road, Authority shall transfer and assign to Department its right of possession, and all its other right, title and interest in and to the land required for the right of way of that portion of the road described in paragraph (d) above which lies within the boundaries of

Fontana Dam Reservation. The Department shall secure and provide for itself all such easements and rights of way as may be necessary for the construction and maintenance of any portion of the Park Road which may be located upon or across any of said North Carolina Exploration Company property.

If and when funds are made available by the Congress for said Park Road as aforesaid, the location and type of said road, the method and manner of constructing the same, and all standards and specifications therefor shall be determined by Department in its sole discretion; provided, however, that said Park Road when constructed shall as a minimum standard be finished throughout its length with a dustless surface not less than twenty (20) feet in width; and provided, further, that said Park Road shall connect at the eastern boundary of the Park, as extended hereunder, at a point to be selected by the Department,
179 with the road which is to be constructed by the State in accordance with and subject to the provisions of section 6 hereof.

The obligation of the Department to construct or provide for the construction of a Park Road as defined in this section 4 shall be subject to and contingent in all respects upon the appropriation by Congress of all funds necessary for such construction, and failure on the part of Congress for any reason to make such appropriations shall not constitute a breach or violation of this agreement by the Department or any other party hereto.

5. Following completion of the Park Road to be constructed by the Department subject to the provisions of section 4, the Department may in its discretion bar said road to commercial use, and restrict the same solely to pleasure and tourist traffic.

6. At such time as the Department shall commence the construction of the Park Road pursuant to section 4 hereof, the State shall forthwith proceed to acquire good and sufficient easements and rights of way for, and shall construct, a road commencing at a point on U. S. Highway 19 in Bryson City, North Carolina, and extending to a point on the eastern boundary of the Park (as extended hereunder) to be selected and designated by the Department, the point so designated by the Department to be such as to provide for the connection of the State road provided for in this section with the Park Road described in section 4. The easements and rights of way to be acquired by the State for said Bryson City-Park Boundary Road shall be not less than two hundred (200) feet in width outside the corporate limits of Bryson City. In all other respects, except for the termini thereof as above provided, the location and type of said road, the method and manner of constructing the same, and all standards and speci-

fications therefor shall be determined by the State in its sole discretion. Provided, however, that said road when con-
180 structed by the State shall as a minimum standard be finished throughout its length with a dustless surface not less than twenty (20) feet in width.

7. Following completion of the construction of the Fontana project by the Authority, the Authority, on its own behalf and as agent of the United States of America, shall quit-claim to the State all of the right, title, and interest which it or the United States of America may have in and to the so-called Fontana Access Road heretofore constructed by the Authority from U. S. Highway 129 near Deals Gap to the left (east) abutment of the Fontana Dam, including all bridges, culverts, and other facilities constituting a part of said access road. In connection with and as a part of the transfer of said access road to the State as aforesaid, the Authority shall also:

(a) Transfer and quit-claim or cause to be transferred and quit-claimed to the State all easements and rights of way acquired by the Authority as agent of the United States appurtenant to those portions or sections of said access road which may be located outside the limits of land of the United States in the custody of the Authority, together with such land as the Authority, as agent of the United States, may hold or acquire in fee west of a point on the north right of way line of said access road approximately one hundred (100) feet west of Lewellyn Branch, and between said north right of way line and the Cheoah Reservoir of Carolina Aluminum Company. For the purposes hereof, the north right of way line of said access road west of said point approximately one hundred (100) feet west of Lewellyn Branch shall be deemed to be a line parallel to and one hundred fifty (150) feet north of the center line of said access road.

(b) Grant and quit-claim or cause to be granted and quit-claimed to the State suitable easements and rights of way for the maintenance of all of the portions of said access road which
181 are located on land of the United States, in the custody of the Authority, where such land is not included in the land to be transferred and quit-claimed to the State under paragraph (a) immediately preceding.

(c) Transfer and assign or cause to be transferred and assigned to the State an agreement between the Authority and Carolina Aluminum Company dated May 5, 1943, relating to an easement for the construction and maintenance of the bridge located on said Fontana Access Road across the Little Tennessee River, together with all rights, privileges, and interests of the Authority and the United States in, to, and under said Agreement.

The State agrees that it will, by formal agreement with the Authority and Carolina Aluminum Company, accept an assignment of the aforesaid agreement of May 5, 1943, and assume all of the duties and obligations of the Authority and the United States of America thereunder, so as to effect the substitution of the State for the Authority and the United States of America for all of the purposes of said agreement as contemplated by section 3 thereof. The State further agrees that, forthwith upon the transfer of said access road as aforesaid, it will open and thereafter maintain said access road for public travel, take over at the expense of the State the maintenance, repair, and upkeep thereof, and thereafter forever hold the Authority and the United States of America harmless on account of any loss, damage, or injury sustained by any person or persons using the same; provided, however, that in transferring said access road to the State as aforesaid, the Authority may reserve the right, but shall have no obligation, to maintain, flatten, plant grass or shrubbery upon, or otherwise modify the slopes of cuts and embankments adjacent to any portion or portions of said access road between the south end of the Little Tennessee River Bridge and the left (east) abutment of Fontana Dam.

182 8. Forthwith upon the execution of this agreement, the State, as a means of cooperating with and assisting the Authority in the purchase of the land described in section 1 hereof, and in the settlement of the problems incident or related thereto, shall pay to the Authority the sum of One Hundred Thousand Dollars ($100,000), such payment to be made for the purposes of and pursuant to the authority contained in S. B. 198 enacted at the 1943 Session of the North Carolina Legislature and approved March 5, 1943.

9. Promptly upon the execution of this agreement, the Authority shall pay to the State Treasurer of North Carolina, Treasurer ex officio of the North Carolina Local Government Commission, in trust for the County, the sum of Four Hundred Thousand Dollars ($400,000), said State Treasurer of North Carolina being hereby designated by the County to receive and receipt for said sum on the County's behalf.

Prior to or simultaneously with the payment of said sum to said State Treasurer of North Carolina, the County shall enter into a trust agreement governing the management and disbursement of said trust fund. Said trust agreement shall be subject to the approval of the North Carolina Local Government Commission, and shall provide that said sum shall be applied by the trustee exclusively to the payment of the principal

of road bonds of the County which are now outstanding and unpaid. The County agrees that said trust agreement, once entered into with the approval of the North Carolina Local Government Commission, shall not be amended, revoked, or supplemented except with the written consent and approval of said Local Government Commission.

Delivery to said State Treasurer, as Treasurer ex officio of the North Carolina Local Government Commission, of the Authority's check in the amount of Four Hundred Thousand Dollars ($400,000), payable to his order as trustee for the County, shall
183 operate as a complete fulfillment and discharge of all obligations of the authority under this section 9.

10. The State and the County hereby agree that they will, forthwith upon receipt of a request from the Authority so to do, by instrument or instruments in form suitable for recording, transfer, assign, convey, and quit-claim unto the Authority and the United States of America all right, title, and interest which they and the public may have in and to that portion or section of existing North Carolina State Highway 288 between Fax Branch and Watkins Branch, in and to all other roads or portions or sections of road (irrespective of elevation) located upon or across any of the land described in section 1 hereof and/or any of the land identified on Exhibit A. hereto as the property of North Carolina Exploration Company, and in and to all other roads or portions or sections of road in the County lying north of the Little Tennessee and Tuckasegee Rivers east of Fontana dam below elevations 1,715 (m. s. l.) including all bridges, culverts, and other facilities constituting a part of any of said roads or portions or sections of road, together with all easements and rights of way appurtenant thereto. The State and the County further agree that they will, forthwith upon receipt of a request from the Authority so to do, take or procure the taking of any and all action which may be necessary and appropriate to vacate and abandon all of the roads and portions or sections of road to be conveyed and quit-claimed as provided in this paragraph, and to close the same to the use of the public. Until such time as the Authority shall request the conveyance and the vacation, abandonment, and closing of the roads or portions or sections of road referred to in this paragraph, all such roads or portions or sections of road shall retain their present status and continue to be used and maintained as public roads or highways.

184 In consideration of the premises and of the covenants and promises of the Authority and the Department in and under this agreement, the State and the County, for themselves, their respective successors, representatives, and assigns,

shall and do hereby, jointly and severally, release, acquit, and discharge the Authority, its successors and assigns and its agents and employees, and the United States of America of and from all obligations, liability, claims and demands of every nature, character or description whether now or hereafter existing, arising out of or in any way connected with the inundation, closing, or taking, under or as the result of this agreement or as the result of the construction, maintenance, or operation of Fontana Dam or Fontana Reservoir, of North Carolina State Highway 288, or any portion or section thereof, wheresoever located, or of any other road or roads or section or sections of road (irrespective of elevation) located wholly or partially upon or across any of the land described in section 1 hereof or any of the land identified on Exhibit A. hereto as the property of North Carolina Exploration Company, or of any road or roads or section or sections of road lying north of the Little Tennessee and Tuckasegee Rivers below elevation 1,715 (m. s. l.), together with all obligations, liability, claims, and demands arising out of or in any way connected with any impairment of the efficiency, value, usability, or convenience of any portion (irrespective of elevation or location) of said Highway 288 or of any of said other roads or sections or road, not so inundated, closed or taken; and the State and the County expressly agree that they will not, jointly or severally, maintain or attempt to maintain any suit or cause of action against the Authority, its agents or employees, or the United States of America based upon or arising out of any such inundation, closing, taking, or impairment, it being the intention hereof
185 that the covenants and promises of the Authority and the Department herein contained shall constitute and effect and be accepted as an immediate, complete, and final payment and discharge of all such obligations, liability, claims, and demands; provided, however, that nothing herein contained shall apply to or preclude any action by the State or the County to enforce compliance or to recover damages for non-compliance by the Authority or the Department with their respective covenants and promises herein made.

11. Anything in section 10 to the contrary notwithstanding, the State does not release or waive or agree not to enforce any claim, demand, or "action over" which it may now or hereafter have against the Authority or the United States, and which is based upon an obligation or liability which the State may have or incur to any landowner by reason of his being deprived of access to land owned by him in Swain County, North Carolina, where such obligation or liability on the part of the State arises out of the inundation, flooding, closing, or other impairment.

under or as the result of this agreement or as the result of the construction, maintenance, or operation of Fontana Dam or Fontana Reservoir, of existing North Carolina State Highway 288 between Fax Branch and Watkins Branch; and the Authority hereby expressly agrees to indemnify the State against and save it harmless from any such obligation or liability; provided, however, that whenever such obligation or liability exists or is alleged or claimed to exist on the part of the State in favor of any landowner, the State shall not, except pursuant to a judicial judgment or decree, pay, compromise, settle, or otherwise dispose of such obligation or liability or any claim, demand, suit, or action based thereon without the written consent of the Authority; and provided further that the Authority shall at all times have and exercise full control over the defense,
186 settlement, and disposition of all claims, demands, suits, and actions filed with or against the State in respect of any such obligation or liability, and may compromise, settle, or dispose of the same in any manner or by any method or procedure which it may see fit to adopt in its sole discretion.

Whenever any claim, demand, suit, or action is made or filed with or against the State in respect of an actual or alleged obligation or liability on the part of the State of the kind referred to in the preceding paragraph of this section, the State shall promptly, and in any event within ten (10) days after receipt of formal written notice there by the State or summons issued by any court and served on the State, give the Authority written notice of the making or filing of such claim, demand, action, or suit, so as to permit the Authority to defend, compromise, settle, or otherwise dispose of the same as herein contemplated. In the event of failure by the State to give the Authority written notice of any such claim, demand action or suit as herein provided, or if the State shall, otherwise than pursuant to judicial judgment or decree, pay, compromise, settle, or otherwise dispose of any such claim, demand, action, or suit without the written consent of the Authority, then and in either or any of such events, the Authority shall be relieved and discharged of any obligation to indemnify the State against or save it harmless from any obligation or liability in respect of such claim, demand, suit, action, or any renewal thereof.

12. This agreement may be simultaneously executed and delivered in any number of counterparts, and each such counterpart shall be deemed an original.

In witness whereof, the parties hereto have caused this
187 agreement to be executed by their proper representatives

thereunto duly authorized as of the day and year first above written.

TENNESSEE VALLEY AUTHORITY,
By ARTHUR S. JAUDREY,
Acting General Manager.

Attest:

GLADYS M. BURNHART,
Assistant Secretary.

STATE OF NORTH CAROLINA,
By J. MELVILLE BROUGHTON, *Governor,*
And by COUNCIL OF STATE,
By J. MELVILLE BROUGHTON, *Chairman.*
And by STATE HIGHWAY AND PUBLIC WORKS COMMISSION,
By D. B. MCCARAY *Chairman.*

Attest:

INA L. FERRELL, *Secretary.*

GRANT OF FLOWAGE EASEMENT AND RELEASE FROM DAMAGES

Tract No. FR-442-F

(Documentary Stamps $275.00 attached)

Contract of May 12, 1944

This indenture, made and entered into this 12th day of May 1944, by and between the North Carolina Exploration Company, a Corporation organized and existing under and by virtue of the laws of the State of Delaware (hereinafter called the "Grantor") and the United States of America (hereinafter called the "Grantee"),

Witnesseth: That for and in consideration of the sum of
188 Two Hundred Fifty Thousand Dollars ($250,000), cash in hand paid by the Tennessee Valley Authority, acting as agent for the United States of America, the receipt whereof is hereby acknowledged, the Grantor has this day bargained and sold and does hereby grant, bargain, sell, transfer and convey unto the Grantee and its assigns easement rights in and over the land hereinafter described, for the following uses and purposes:

(1) Over that portion of the following described land which lies below contour elevation 1715.63, Mean Sea level (all elevations referred to herein being based upon Mean Sea Level as established by the Southeastern Supplementary Adjustment of 1936, U. S. C. & G. S.), and containing 389 acres, more or less:

(a) The right to overflow, flood, and cover said hereinafter designated backwater created by the erection and operation of Fontana Dam across the Little Tennessee River.

(b) The right to enter upon said land from time to time and prepare the reservoir area for impoundage of the water and remove therefrom any timber or other natural growth and any obstructions, accumulations, trash, filth or any other thing which would interfere with navigation or flood control.

(c) Excepting use of the property for mining purposes, the right to prevent the draining or dumping into said reservoir of such other refuse, sewerage, or other material not reasonably connected with mining operations which might tend to pollute the same.

(d) The right to enter upon said land and do such drainage and other as in the discretion of the Authority may be necessary to carry out an adequate program of malaria control, including the maintenance of necessary patrols and the application of larvicides.

(e) The right to enter upon said land and do such dredging, excavating, and other channel improvement work as in the discretion of the Authority may be necessary, together with the right to erect and maintain beacons or other signal structures as aids to navigation.

189 (2) Over that portion of the following described land which lies between contour elevation 1,715.63 and elevation 1,722.63 and containing 10 acres, more or less, the right to temporarily overflow the land and store water during flood periods.

The land affected by the easement rights set forth above is located in Forneys Creek Township of Swain County, State of North Carolina, on the right bank of the Little Tennessee River, approximately 1 mile east of the Fontana Dam, and is more particularly described as follows:

Beginning at a 36-inch sycamore tree in the east boundary line herein described, a corner of the lands of the Swain County Board of Education, and the Nantahala Power & Light Company; thence with the Company's line S. 26°00′ W., 210 feet to a point in the Little Tennessee River; thence with river as it meanders downstream approximately 2,210 feet to a point, a corner of the lands of the Nantahala Power & Light Company, and the J. E. Coburn Heirs; thence with the J. E. Coburn Heirs' line N. 16°00′ E., 210 feet to a point on the right bank of the river; thence N. 19°00′ W., 35 feet to a point in the south right of way line of the Carolina-Tennessee Southern Railway, a corner of the lands of the J. E. Coburn Heirs, and the Carolina-Tennessee Southern Railway Company; thence with the Railway Company's line and the right of way line in a southeasterly direction approximately 2,200 feet

to a point, a corner of the lands of the Carolina-Tennessee Southern Railway Company, and the Swain County Board of Education; thence with the Board's line at right angles to the right of way line of the Railroad S. 35°15′ W., 50 feet to a point; thence parallel to the right of way line of the railroad S. 54°45′ E., 100 feet to the point of beginning.

Also, beginning at a point, a corner of the lands of the J. E. Coburn Heirs, and the Nantahala Power & Light Company, and the most southerly point of the parcel herein described; thence with the Company's line N. 55°12′ W., 1,084 feet to a point in the center line of Myers Branch; thence with the center line of the branch as it meanders downstream approximately 160 feet to a point witnessed by a pipe and a 13-inch buckeye tree;
190 thence, leaving the branch, N. 86°46′ W., 244 feet to a point; thence S. 35°15′ W., 70 feet to a point in the northeast right of way line of the Carolina-Tennessee Southern Railway, a corner of the lands of the Nantahala Power & Light Company, and the Carolina-Tennessee Southern Railway Company; thence with the Railway Company's line and the right of way line in a northwesterly direction approximately 2,390 feet, crossing Eagle Creek at approximately 2,100 feet, to a point, a corner of the lands of the Carolina-Tennessee Southern Railway Company, and the J. E. Coburn Heirs; thence with the J. E. Coburn Heirs' line N. 19°00′ W., 215 feet to a point; thence N. 64°00′ W., 90 feet to a point at the top of the ridge and in a line 300 feet from and parallel to the right bank of the Little Tennessee River, a corner of the lands of the J. E. Coburn Heirs, and the J. E. & Bland W. Coburn Heirs, thence with the J. E. & Bland W. Coburn Heirs' line and the top of the ridge as it meanders approximately along the following bearings and distances:

N. 47°00′ W., 670 feet; N. 23°00′ W., 460 feet to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general northerly direction along the west side of Eagle Creek, the said contour line being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 24°00′ E., 210 feet; N. 51°00′ W., 70 feet; N. 14°00′ E., 60 feet; N. 71°00′ E., 100 feet; N. 45°00′ E., 155 feet; N. 41°00′ W., 60 feet; N. 4°00′ E., 140 feet; N. 21°00′ W., 195 feet; N. 3°00′ W., 230 feet; N. 24°00′ W., 110 feet; N. 29°00′ E., 305 feet; N. 38°00′ E., 270 feet; N. 50°00′ E., 190 feet; N. 17°00′ W., 140 feet; 73°00′ E., 140 feet; N. 14°00′ E., 145 reet; N. 57°00′ E., 110 feet; N. 77°00′ E., 255 feet; N. 59°00′ E., 170 feet; S. 52°00′ E., 135 feet; N. 89°00′ E., 155 feet; N. 15°00′ E., 145 feet; N. 41°00′ W., 85 feet; S. 83°00′ W., 80 feet; N. 57°00′ W., 170 feet; S. 51°00′ W., 170 feet; N. 57°00′

W., 270 feet; S. 65°00′ W., 150 feet; N. 56°00′ W., 85 feet; N. 28°00′ W., 150 feet; S. 80°00′ W., 90 feet; N. 35°00′ W., 95 feet; N. 76°00′ W., 110 feet; S. 81°00′ W., 120 feet; S. 45°00′ W., 120 feet; N. 33°30′ W., 410 feet to a point in the Bland W. Coburn Heirs' line, the said point being N. 65°34′ E., approximately 760 feet from the point in State Highway No. 288 and at the
191 top of a ridge which is a common corner of the lands of the North Carolina Exploration Company, the J. E. & Bland W. Coburn Heirs, and the Bland W. Coburn Heirs; thence with the Bland W. Coburn Heirs' line N. 65°34′ E., 2,370 feet, crossing the narrow gauge railroad of North Carolina Exploration Company at approximately 900 feet, to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general southerly direction east of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line. S. 20° W., 210 feet; S. 10°00′ W., 145 feet; S. 38°00′ E., 180 feet; S. 7°00′ W., 155 feet; S. 73°30′ W., 190 feet; S. 62°00′ E., 385 feet; S. 29°00′ E., 220 feet; S. 75°00′ E., 95 feet; N. 58°00′ E., 245 feet; N. 87°30′ E. 390 feet; S. 24°30′ W., 310 feet; S. 23°00′ E. 105 feet; S. 84°00′ W., 155 feet; S. 44°30′ W., 270 feet; S. 2°00′ W. 100 feet; S. 12°00′ E., 150 feet; S. 30°00′ W., 240 feet; S. 83°00′ E., 29 feet; S. 28°00′ E., 110 feet; S. 52°00′ W., 135 feet; S. 32°00′ E., 250 feet; S. 17°00′ W., 440 feet; N. 26°30′ E., 710 feet; N. 67°00′ E., 150 feet; N. 29°00′ E. 200 feet; S. 86°00′ E., 190 feet; S. 25°00′ W., 315 feet; S. 47°01′ E. 190 feet; S. 68°00′ W., 320 feet S. 10°00′ W., 260 feet; S. 26°00′ E., 100 feet; S. 36°30′ W. 870 feet; S. 12°00′ W. 150 feet; S. 70°00′ E., 155 feet; S. 47°00′ E., 100 feet; S. 56°00′ 150 feet; S 30°00′ W., 150 feet; N. 66°00′ E., 220 feet; S. 86°00′ E., 180 feet; S. 39°00′ W., 240 feet; S. 22°00′ E., 205 feet; S. 79°00′ W., 230 feet; S. 5°00′ E., 210 feet; S. 29/00′ E., 150 feet to a point in a line of the land in dispute between the W. L. Myers Heirs and the North Carolina Exploration Company; thence with the line claims by the W. L. Myers as their boundary line S. 70°34″ W., 40 feet to a point, thence S. 24°06′ E., 196 feet to a point in the 1,722.63 foot contour line, thence with the contour line and a severance line as it meanders in a general westerly direction along the south side of a bend in Eagle Creek and subsequently in a general easterly direction along the north side of the Little Tennessee River, the said contour being defined approximately by the following bearings and distances, the contour however, being the true severance line.

N. 74°00′ W., 95 feet; N. 24°00′ W., 190 feet; N. 60°00′
192 W., 400 feet; S. 37°00′ W., 185 feet; N. 50°00′ W., 215 feet; S. 68°00′ W., 170 feet; N. 70°00′ W., 245 feet; S. 2°00′

E., 180 feet; S. 43°00′ E., 110 feet; S. 82°00′ E., 380 feet; S. 9°00′ E., 200 feet; S. 73°00′ E., 440 feet; S. 56°00′ E., 620 feet to a point in Martha J. Myres line; thence with Martha J. Myers line S. 30°51′ W., 425 feet to a point; thence N. 89°51 E., 956 feet to a point; thence N. 52°21′ E., 400 feet to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general southeasterly direction along the north side of the Little Tennessee River, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line;

S. 12°00′ W., 120 feet; S. 72°00′ W., 160 feet; S. 23°00′ W., 350 feet; S. 53°00′ E., 330 feet; N. 65°00′ E., 250 feet; S. 22°00′ E., 390 feet to a point in the J. E. Coburn Heirs line; thence with the J. E. Coburn Heirs line S. 54°19′ W., 360 feet to the point of beginning. Except, ther'from, 4.5 acres, more or less, comprising an island at a water elevation of 1,722.63, the said island being more particularly described as follows: Beginning at a point in the 1,722.63 feet elevation, the said point being N. 47°30′ E., 1,660 feet from the point at the top of a ridge and in a line 300 feet and parallel to the right bank of the Little Tennessee River which is the common corner of the lands of the J. E. Coburn Heirs, the J. E. & Bland W. Coburn Heirs, and the North Carolina Exploration Company; thence with the contour and an severance line as it meanders around the shore of the island, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line.

N. 23°00′ W., 95 feet; N. 23°00′ E., 250 feet; N. 19°00′ W., 360 feet; S. 73°00′ E., 295 feet; N. 80°00′ E., 270 feet; S. 38°00′ W., 505 feet; S. 23°00′ W., 185 feet; S. 67°00′ W., 120 feet to the point of beginning.

Also beginning at a point in the Bland W. Coburn Heirs line and in the 1,722.63 foot contour line, the said point being S. 24°26′ E., approximately 975 feet from the Chestnut stump and iron pin which is a common corner of the lands of the Bland W. Coburn Heirs, R. E. Wood, and the North Carolina Exploration Company; thence with the contour line and a severance line as it
193 meanders in a general northeasterly direction along the west side of Eagle Creek, the said contour being defined approximately by the following bearings and distance the contour, however, being the true severance line.

N. 2°00′ W., 140 feet; N. 27°00′ E., 220 feet; N. 63°30′ E., 275 feet; N. 5°00′ W. 130 feet; S. 79°00′ E., 125 feet; S. 55°00′ E., 240 feet; N. 76°00′ E., 130 feet; S. 75°30′ E., 220 feet; N. 75°00′ E., 220 feet; N. 8°00′ E., 165 feet; N. 87°01′ W., 130 feet; N. 35°00′ W., 190 feet; N. 3°00′ W., 320 feet; N. 21°30′ E., 350

feet to a point in R. E. Wood's line; thence with R. E. Wood's line, N. 76°01′ E., 318 feet to a point in the center line of Eagle Creek near the mouth of Lost Cove Branch; thence with the center line of the creek as it meanders upstream approximately 1,190 feet to a point in the 1,722.63-foot contour line; thence with the contour line and a severance line as it meanders in a general southerly direction along the east side of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however being the true severance line:

S. 54°00′ E., 160 feet; S. 21°00′ W., 135 feet; S. 65°00′ W., 165 feet; N. 68°00′ W., 400 feet; S. 64°00′ W., 160 feet; S. 11°00′ W., 140 feet; S. 36°00′ W., 180 feet; S. 57°00′ W., 130 feet; S. 53°00′ E., 370 feet; S. 8°30′, 230 feet; S. 24°00′ W., 280 feet; S. 53°00′ W., 245 feet; S. 74°00′ W., 480 feet; N. 89°00′ W., 235 feet; S. 54°00′ W., 190 feet; S. 69°00′ E., 250 feet; S. 79°00′ E., 185 feet; S. 64°30′, 420 feet; N. 79°00′ E., 225 feet; S. 81°00′ E., 340 feet; S. 68°00′ W., 410 feet; S. 40°00′ W., 415 feet; S. 21°00′ E., 330 feet; S. 83°00′ E., 290 feet; S. 60°00′ E., 290 feet; N. 25°00′ E. 465 feet; N. 47°00′ 90 feet; S. 13°00′ E., 350 feet; S. 42°00′ W., 145 feet; S. 1°00′ E., 220 feet; S. 50°00′ W., 110 feet; S. 34°00′ E., 140 feet; N. 69°00′ E., 680 feet; S. 66°00′ E., 90 feet; N. 71°00′ E., 170 feet; N. 16°00′ E., 190 feet; N. 26°00′ E., 120 feet; S. 27°00 E., 250 feet; S. 73°00′ E., 125 feet; N. 74°00′ E., 160 feet; N. 53°00′ E., 290 feet; N. 62°00′ E., 330 feet; S. 76°30′ E., 220 feet; S. 58°00′ W., 190 feet; S. 45°00′ W., 305 feet; S. 59°00′ W., 240 feet; S. 42°00′ W., 465 feet; S. 3°00′ E., 245 feet; S. 77°00′ W., 335 feet; N. 74°00′ W., 350 feet; S. 84°00′ W., 280 feet; S. 56°00′ W., 380 feet; S. 30°00′ W., 375 feet; S. 2°00′ W., 155 feet; N. 85°00′ W., 130 feet; S. 12°00′ W., 155 feet; S. 87°30′ W., 295 feet to a point in
194 the Bland W. Coburn Heirs line; thence with the Bland W. Coburn Heirs line N. 24°26′ 690 feet, crossing Eagle Creek at approximately 420 feet, to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general northly direction along the west side of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however being the true severance line:

N. 76°00′ E., 275 feet; N. 12°00′ E., 110 feet; N. 35°00′ W., 195 feet; N. 14°00′ E., 55 feet; N. 59°00′ E., 105 feet; N. 42°00′ W., 325 feet; N. 60°00′ W., 100 feet; S. 71°00′ W., 160 feet; N. 58°00′ W., 220 feet to a point in the Bland W. Coburn Heirs line; thence with the Bland W. Coburn Heirs line N. 24°26′ W., 1,059 feet to a point in the 1,722.63-foot contour line; thence with the contour line and a severance line as it meanders

first in a northeasterly and then in a northwesterly direction along the west side of Eagle Creek, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 64°00′ E., 260 feet; N. 72°00′ W., 350 feet to a point in the Bland W. Coburn Heirs line; thence with the Bland W. Coburn Heirs line N. 24°26′ W., 515 feet to the point of beginning. Except, therefrom, 0.9 acre, more or less, comprising an island at a water elevation of 1,722.63, the said island being more particularly described as follows: Beginning at a point in the 1,722.63-foot contour line, the said point being S. 35°30′ E., 2,340 feet from the chestnut stump and iron pin which is the common corner of the lands of the Bland W. Coburn Heirs, R. E. Wood, and the North Carolina Exploration Company; thence with the contour and a severance line as it meanders around the shore of the island, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 77°00′ E., 170 feet; S. 14°00′ E., 30 feet; S. 42°00′ W., 190 feet; N. 73°00′ W., 115 feet; N. 35°00′ E., 120 feet to the point of beginning.

All of the above described land contains a total of 399 acres, more or less, of which 389 acres, more or less, lie below elevation 1,715.63.

The easement rights set forth above are to be acquired
195 subject to such rights as may be vested in the country or state to State Highway No. 288 which affects approximately 9.5 acres and to any other rights of way for public roads traversing the described land, and to such rights as may be vested in third parties to railway, telephone, and transmission line rights of way, and the lands affected by the said easement rights are shown on Tennessee Valley Authority Land Maps. 19MS 421 K. 504-2 and 19MS 421 K. 504-3, Fontana Reservoir, a copy of each of which will be filed in the Register of Deeds Office of Swain County, N. C.

It is understood and agreed that the bearings given in the above description are based on the North Carolina State Coordinate System, Lambert Projection, as established by the U. S. Coast and Geodetic Survey. The central meridian for this coordinate system is located at Longitude 79°00′ W. The elevation given therein refer to Mean Sea Level Datum and are based on the U. S. Coast and Geodetic Survey's Southeastern Supplementary Adjustment of 1936.

To have and to hold the aforedescribed easement rights unto the Grantee and unto its assigns forever.

The Grantor, for itself, its successors and assigns, does hereby covenant to and with the Grantee that it is lawfully seized and possessed of the above described tract of land, that it has a good and lawful right to sell and convey the above described easement rights therein, that said land is free and clear of all encumbrances, and that it will forever warrant and defend the title thereto against the lawful claims of all persons whosoever. There is excepted the mineral interest heretofore severed from the fee within the bounds of State Grant No. 1360, as shown in a deed from C. E. Johnston et al., to J. E. Coburn, recorded in Book 20, page 305, public records of Swain County, North Carolina, and now claimed by M. S. Stein and the successors of Joseph P. Sadler deceased, which mineral interest is in land more particularly described hereinafter.

Beginning at a point of intersection of the northwest boundary of Martha J. Myers' land and the southwest boundary line of Grant No. 1360, the said point being N. 30°51' E., 24 feet from the most westerly corner of Martha J. Myers' land; thence with the southwest boundary line of Grant No. 1360, N. 53°12' W., 2,352 feet to a point (Coordinates: N. 654,049; E. 574,636);
196 thence with the west boundary line of Grant No. 1360, N. 25°31' E., 3,940 feet to a point in the 1,722.63 foot contour on the east side of Eagle Creek; thence with a severance line and the contour line as it meanders in a general southerly direction along the east side of the creek, the said contour being defined approximately by the following bearings and distances, the contour, however, being the true severance line:

N. 87°30' E., 340 feet; S. 24°30' W., 310 feet; S. 23° E., 105 feet; S. 84° W., 155 feet; S. 44°30' W., 270 feet; S. 2° W., 100 feet; S. 12° E., 150 feet; S. 30° W., 240 feet; S. 83° E., 290 feet; S. 28° E., 110 feet; S. 52° W., 135 feet; S. 32° E., 250 feet; S. 17° W., 440 feet; N. 26°30' E., 710 feet; N. 67°E., 150 feet; N. 29°E., 200 feet; S. 86° E., 190 feet; S. 25° W., 315 feet; S. 47° E., 190 feet; S. 68° W., 320 feet; S. 10° W., 260 feet; S. 26° E., 100 feet; S. 36°30' W., 870 feet; S. 12° W., 150 feet; S. 70° E., 155 feet; S. 47° E., 100 feet; S. 56° W., 150 feet; S. 30° W., 150 feet; N. 66° E., 220 feet; S. 86° E., 180 feet; S. 39° W., 240 feet; S. 22° E., 205 feet; S. 79° W., 230 feet; S. 5° E., 210 feet; S. 29° E., 150 feet to a point in a boundary line of the land in dispute between the W. L. Myers Heirs and the North Carolina Exploration Company; thence with the line claimed by the W. L. Myers Heirs as their boundary line S. 70°34' W., 40 feet to a point; thence S. 24°06' E., 196 feet to a point in the 1,722.63 foot contour line; thence with the contour line and a severance line as it meanders in a general westerly direction along the south side of a bend in Eagle Creek and subse-

quently in a general easterly direction along the north side of the Little Tennessee River, the said contour being defined approximately by the following bearings and distances, the contour being the true severance line:

N. 74° W., 95 feet; N. 24° W., 190 feet; N. 60° W., 400 feet; S. 37° W., 185 feet; N. 50° W., 215 feet; S. 68° W., 170 feet; N. 70° W., 245 feet; S. 2° E., 180 feet; S. 43° E., 110 feet; S. 82° E., 380 feet; S. 9° E., 200 feet; S. 73° E., 440 feet; S. 56° E., 620 feet to a point in Martha J. Myers' line; thence with Martha J. Myers' line S. 30°51′ W., 401 feet, to the point of beginning.

Also, beginning at a point of intersection of the southwest boundary line of Grant No. 1360 and the south boundary line of Martha J. Myers' land (Coordinates: 652,620; E. 576,547) the said
197 point being N. 89°51′ E., 40 feet from the most westerly corner of Martha J. Myers' land; thence with Martha J. Myers' line N. 89°51′ E., 403 feet to a point in the east boundary line of Grant No. 1360; thence with the east boundary line of Grant No. 1360; S. 3°43′ W., 289 feet, passing a pine stump at approximately 50 feet, to a point in the northeast boundary line of the Nantahala Power & Light Company's land and at the most southerly corner of Grant No. 1360; thence with the Nantahala Power & Light Company's line and the southwest boundary line of Grant No. 1360, N. 53°12′ W., 479 feet, leaving the Nantahala Power & Light Company's line and crossing Myers Branch at 21 feet, to the point of beginning.

All of the above described land contains a total of 107.7 acres, more or less, of which 4.5 acres, more or less, lie above elevation 1,772.63, leaving a net total of 103.2 acres, more or less, lying below elevation 1,722.63.

It is understood and agreed that the coordinates and bearings given in the above description are for the North Carolina State Coordinate System, Lambert Projection, as established by the U. S. Coast and Geodetic Survey. The origin for this coordinate system is at Latitude 33°45′ N., and Longitude 79°00′ W., and has been assigned a value of x=2,000,000 feet and y=0 feet.

In further consideration of the purchase price of $250,000, the Company, for itself, its successors and assigns forever, hereby releases, acquits and discharges the Authority, its successors and assigns and its agents and employees, and the United States of America, of and from all obligations, liability, claims and demands of every nature, character, and description, whether now or hereafter existing, arising out of or in any way connected with any loss, damage, interference, impairment of the efficiency, value, usability or convenience, or injury resulting to the above described property, to any other property owned by the Company

in the Fontana Reservoir area and any mining operations now or which may hereafter be conducted thereon, where such loss, damage, interference, impairment or injury is or may be alleged or claimed to have resulted from or to be in any way connected with the construction of Fontana Dam or the creation or operation of Fontana Reservoir, including but not limited to: (a) the loss, destruction and impairment of all means of access and access facilities of every description, which shall
198 extend to, include and relieve from any responsibility in connection therewith, the State of North Carolina and Swain County, North Carolina, an (b) the loss, damage, impairment, interference or injury to the said property or to any and all mining operations which may now or hereafter be conducted thereon, resulting from flooding, seeping, or percolating waters. The Company expressly agrees, for itself, its successors and assigns, not to maintain or attempt to maintain any action or cause of action against the Authority, its agents or employees, or the United States of America, based upon or arising out of any such loss, damage, interference, impairment of injury, it being the intention hereof that the payment made by the Authority hereunder constitutes and effects, and is hereby accepted as, an immediate, complete and final payment and discharge and just compensation of all obligations, liability, claims and demands whatsoever, arising out of the construction of Fontana Dam and the creation and operation of Fontana Reservoir on the Little Tennessee River in North Carolina.

The Grantor understands and hereby agrees that all buildings and fences located on that portion of the above described land lying below the 1,715.63 contour level constitute potential hazards to navigation and must be removed. This conveyance is made, however, upon the condition that the Grantor may salvage said buildings provided they are removed from the land prior to a date which will be determined by the Tennessee Valley Authority and said Authority shall give notice to the Grantor, orally or by letter, at least 30 days in advance of said date.

In witness whereof, the North Carolina Exploration Company, the Grantor herein, has caused this instrument to be executed by its duly authorized officers on this the day and year first above written.

NORTH CAROLINA EXPLORATION COMPANY,
By M. A. CAINE, *President.*

Attest:

[SEAL AFFIXED] HENRY KAUFMAN, *Secretary.*

199 STATE OF NEW YORK,
County of New York.

This is to certify that on the 12th day of May 1944, before me personally came M. A. Caine, with whom I am personally acquainted, who, being by me duly sworn, says that he is the president, and that Henry Kaufman is the secretary of the North Carolina Exploration company, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president and secretary subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation.

Witness my hand and official seal, this the 12th day of May 1944.
My commission expires March 30, 1946.—

[SEAL AFFIXED] FELIX A. WAGNER,
Notary Public.

Felix A. Wagner, Notary Public.
King's Co. Clk's No. 78, Reg No. 94–w–6.
Certificate filed in N. Y. Co.
N. Y. Co. Clk's No. 96, Reg. No. 66–W–6.

STATE OF NORTH CAROLINA,
Swain County.

The foregoing certificate of Felix A. Wagner, a Notary Public of Kings County, New York, New York, attested by his official seal, is adjudged to be correct. Let the instrument, and the certificate be registered.

Witness my hand this 20th day of May A. D. 1944.

H. J. TRUETT,
Clerk of Superior Court.

200 Filed for registration at 4:55 o'clock P. M., May 20, 1944, and registered in the office of the Register of Deeds for Swain County, North Carolina, in Book 67, Page 391, 20 May 1944.

[SEAL] D. R. WELCH,
Deputy Register of Deeds,
Swain County, North Carolina.

This the 15th day of Nov. 1944. This is a true and a correct copy of the Records of this office of the Register of Deeds for Swain County, North Carolina, in Deed Book 67, Page 391.

[SEAL] D. R. WELCH,
Deputy Register of Deeds, Swain County, North Carolina.

201 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5373

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

S. COLUMBUS WELCH, APPELLEE

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

April 18, 1945, the appearance of McKinley Edwards is entered for the appellee.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellee are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5374, 5375, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

202 No. 5373

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

S. COLUMBUS WELCH, APPELLEE

No. 5374

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

JOHN BURNS, ET AL., APPELLEES

No. 5375

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

FRED LOLLIS, ET AL., APPELLEES

No. 5376

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ARNOLD E. BRADSHAW, ET AL., APPELLEES

No. 5377

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

PHILIP G. RUST, ET AL., APPELLEES

No. 5378

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

203 Appeals From the District Court of the United States for the Western District of North Carolina, at Asheville

(Argued June 19, 1945—Decided July 21, 1945)

Before PARKER, SOPER, and DOBIE, Circuit Judges

William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority (Thomas J. Griffin, Solicitor, and Charles J. McCarthy, Assistant General Counsel, Tennessee Valley Authority, on brief),

for Appellant, and George H. Ward and McKinley Edwards (G. Lyle Jones on brief) for Appellees.

PARKER, Circuit Judge:

These are appeals from judgments dismissing petitions of the Tennessee Valley Authority for the condemnation of certain tracts of land. The TVA seeks to acquire the lands in order that it may convey them to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, pursuant to a contract by which its liability for flooding a highway of the State of North Carolina is to be thus extinguished. The District Judge, being of opinion that the power of condemnation vested by Congress in the TVA did not authorize condemnation for such purpose, dismissed the proceedings, and the TVA has appealed.

There is no dispute about the facts. The TVA was created by Congress for the purpose of maintaining and operating the Muscle Shoals properties, improving navigation in the Tennessee River and controlling destructive flood waters in the basins of the Tennessee and Mississippi Rivers. 16 USCA 831. Under the powers granted it by the act, it constructed a large dam and reservoir on the Little Tennessee River in Western North Carolina known as the Fontana Dam and Reservoir. The filling of this reservoir flooded throughout most of its length North Carolina State Highway No. 288, which was the only highway serving the land lying between the Little Tennessee River and the Great Smoky Mountains National Park. There were 44,400 acres of this land and 216 families were living on it at the time.

None of the 44,400-acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a contract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway.

204 The contract referred to arose out of the following circumstances: The territory served by Highway No. 288 was rough mountain land, and the construction of another highway in lieu of the one flooded would have been very expensive and priorities necessary to obtain the manpower and materials for its construction would not have been available in wartime. There was evidence that such highway would have cost $1,400,000, which was more than it would have cost to acquire the 44,400 acres and satisfy

the State of North Carolina for closing the road, and probably a great deal more than any damages recoverable for the closing of the old highway. The 44,400 acres were lands that North Carolina had agreed to convey to the Great Smoky Mountains National Park but had not conveyed because funds for the purchase of park lands had been exhausted before these lands could be acquired. Officials of the state felt, however, that some obligation rested on the state with respect to the matter; and they proceeded to avail themselves of this opportunity to discharge the obligation and entered into a contract which would result in the deeding of the lands to the Park. That contract, to which the TVA, the State of North Carolina, Swain County, and the Department of the Interior were parties, set forth its purpose fully in eleven "whereas" clauses, the last of which is as follows:

"Whereas, the parties hereto desire to provide for and agree upon the extension of the Park boundaries as aforesaid, the closing and ultimate replacement of Highway 288, and the immediate and final settlement and disposition of all claims which the State and the County may at any time have against the Authority or the United States of America by reason of the flooding, taking, or closing of said Highway 288 and the other roads hereinafter described or referred to, all in the manner and upon the terms and conditions hereinafter specified, and all to the end and purpose of avoiding unwise and inefficient expenditures of public funds and of capturing certain benefits for the region affected and the public generally."

The contract contained the following provisions: (1) that the TVA would acquire the 44,400 acres and deed it to the Department of the Interior to be included in the park, would save the state and county harmless from any claims for damages for the flooding of the highway, and would pay $400,000 to the State of North Carolina in trust for Swain County to be used in retiring bonds issued to finance the construction of the highway which had been flooded; (2) that the Department of the Interior would accept the 44,400 acres of land, include it within the boundaries of the Great Smoky Mountains National Park, and, after the war,
205 and as soon as Congress should make the funds available, would construct a high-grade parkway from a point near Fontana Dam to a point near Bryson City, N. C.; and (3) that the State of North Carolina would pay $100,000 to the TVA to aid in the purchase of the lands and would build certain roads to connect with the parkway when it should be constructed.

Pursuant to this contract, the TVA proceeded to acquire by purchase more than 38,000 acres of the land—all of the 44,400 acres, except the six tracts involved in these condemnation proceedings

in the Fontana Reservoir area and any mining operations now or which may hereafter be conducted thereon, where such loss, damage, interference, impairment or injury is or may be alleged or claimed to have resulted from or to be in any way connected with the construction of Fontana Dam or the creation or operation of Fontana Reservoir, including but not limited to: (a) the loss, destruction and impairment of all means of access and access facilities of every description, which shall
198 extend to, include and relieve from any responsibility in connection therewith, the State of North Carolina and Swain County, North Carolina, an (b) the loss, damage, impairment, interference or injury to the said property or to any and all mining operations which may now or hereafter be conducted thereon, resulting from flooding, seeping, or percolating waters. The Company expressly agrees, for itself, its successors and assigns, not to maintain or attempt to maintain any action or cause of action against the Authority, its agents or employees, or the United States of America, based upon or arising out of any such loss, damage, interference, impairment of injury, it being the intention hereof that the payment made by the Authority hereunder constitutes and effects, and is hereby accepted as, an immediate, complete and final payment and discharge and just compensation of all obligations, liability, claims and demands whatsoever, arising out of the construction of Fontana Dam and the creation and operation of Fontana Reservoir on the Little Tennessee River in North Carolina.

The Grantor understands and hereby agrees that all buildings and fences located on that portion of the above described land lying below the 1,715.63 contour level constitute potential hazards to navigation and must be removed. This conveyance is made, however, upon the condition that the Grantor may salvage said buildings provided they are removed from the land prior to a date which will be determined by the Tennessee Valley Authority and said Authority shall give notice to the Grantor, orally or by letter, at least 30 days in advance of said date.

In witness whereof, the North Carolina Exploration Company, the Grantor herein, has caused this instrument to be executed by its duly authorized officers on this the day and year first above written.

NORTH CAROLINA EXPLORATION COMPANY.
By M. A. CAINE, *President.*

Attest:

[SEAL AFFIXED] HENRY KAUFMAN, *Secretary.*

199 STATE OF NEW YORK,
County of New York.

This is to certify that on the 12th day of May 1944, before me personally came M. A. Caine, with whom I am personally acquainted, who, being by me duly sworn, says that he is the president, and that Henry Kaufman is the secretary of the North Carolina Exploration Company, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president and secretary subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation.

Witness my hand and official seal, this the 12th day of May 1944.
My commission expires March 30, 1946.—

[SEAL AFFIXED] FELIX A. WAGNER,
Notary Public.

Felix A. Wagner, Notary Public.
King's Co. Clk's No. 78, Reg No. 94–w–6.
Certificate filed in N. Y. Co.
N. Y. Co. Clk's No. 96, Reg. No. 66–W–6.

STATE OF NORTH CAROLINA,
Swain County.

The foregoing certificate of Felix A. Wagner, a Notary Public of Kings County, New York, New York, attested by his official seal, is adjudged to be correct. Let the instrument, and the certificate be registered.

Witness my hand this 20th day of May A. D. 1944.

H. J. TRUETT,
Clerk of Superior Court.

200 Filed for registration at 4:55 o'clock P. M., May 20, 1944, and registered in the office of the Register of Deeds for Swain County, North Carolina, in Book 67, Page 391, 20 May 1944.

[SEAL] D. R. WELCH,
Deputy Register of Deeds,
Swain County, North Carolina.

This the 15th day of Nov. 1944. This is a true and a correct copy of the Records of this office of the Register of Deeds for Swain County, North Carolina, in Deed Book 67, Page 391.

[SEAL] D. R. WELCH.
Deputy Register of Deeds, Swain County, North Carolina.

201 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5373

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v.

S. COLUMBUS WELCH, APPELLEE

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April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

April 18, 1945, the appearance of McKinley Edwards is entered for the appellee.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellee are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5374, 5375, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

202 No. 5373

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UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

203 Appeals From the District Court of the United States for the Western District of North Carolina, at Asheville

(Argued June 19, 1945—Decided July 21, 1945)

Before PARKER, SOPER, and DOBIE, Circuit Judges

William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority (Thomas J. Griffin, Solicitor, and Charles J. McCarthy, Assistant General Counsel, Tennessee Valley Authority, on brief),

679355—46——9

for Appellant, and George H. Ward and McKinley Edwards (G. Lyle Jones on brief) for Appellees.

PARKER, Circuit Judge:

These are appeals from judgments dismissing petitions of the Tennessee Valley Authority for the condemnation of certain tracts of land. The TVA seeks to acquire the lands in order that it may convey them to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, pursuant to a contract by which its liability for flooding a highway of the State of North Carolina is to be thus extinguished. The District Judge, being of opinion that the power of condemnation vested by Congress in the TVA did not authorize condemnation for such purpose, dismissed the proceedings, and the TVA has appealed.

There is no dispute about the facts. The TVA was created by Congress for the purpose of maintaining and operating the Muscle Shoals properties, improving navigation in the Tennessee River and controlling destructive flood waters in the basins of the Tennessee and Mississippi Rivers. 16 USCA 831. Under the powers granted it by the act, it constructed a large dam and reservoir on the Little Tennessee River in Western North Carolina known as the Fontana Dam and Reservoir. The filling of this reservoir flooded throughout most of its length North Carolina State Highway No. 288, which was the only highway serving the land lying between the Little Tennessee River and the Great Smoky Mountains National Park. There were 44,400 acres of this land and 216 families were living on it at the time.

None of the 44,400-acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a contract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway.

204 The contract referred to arose out of the following circumstances: The territory served by Highway No. 288 was rough mountain land, and the construction of another highway in lieu of the one flooded would have been very expensive and priorities necessary to obtain the manpower and materials for its construction would not have been available in wartime. There was evidence that such highway would have cost $1,400,000, which was more than it would have cost to acquire the 44,400 acres and satisfy

the State of North Carolina for closing the road, and probably a great deal more than any damages recoverable for the closing of the old highway. The 44,400 acres were lands that North Carolina had agreed to convey to the Great Smoky Mountains National Park but had not conveyed because funds for the purchase of park lands had been exhausted before these lands could be acquired. Officials of the state felt, however, that some obligation rested on the state with respect to the matter; and they proceeded to avail themselves of this opportunity to discharge the obligation and entered into a contract which would result in the deeding of the lands to the Park. That contract, to which the TVA, the State of North Carolina, Swain County, and the Department of the Interior were parties, set forth its purpose fully in eleven "whereas" clauses, the last of which is as follows:

"Whereas, the parties hereto desire to provide for and agree upon the extension of the Park boundaries as aforesaid, the closing and ultimate replacement of Highway 288, and the immediate and final settlement and disposition of all claims which the State and the County may at any time have against the Authority or the United States of America by reason of the flooding, taking, or closing of said Highway 288 and the other roads hereinafter described or referred to, all in the manner and upon the terms and conditions hereinafter specified, and all to the end and purpose of avoiding unwise and inefficient expenditures of public funds and of capturing certain benefits for the region affected and the public generally."

The contract contained the following provisions: (1) that the TVA would acquire the 44,400 acres and deed it to the Department of the Interior to be included in the park, would save the state and county harmless from any claims for damages for the flooding of the highway, and would pay $400,000 to the State of North Carolina in trust for Swain County to be used in retiring bonds issued to finance the construction of the highway which had been flooded; (2) that the Department of the Interior would accept the 44,400 acres of land, include it within the boundaries of the Great Smoky Mountains National Park, and, after the war,
205 and as soon as Congress should make the funds available, would construct a high-grade parkway from a point near Fontana Dam to a point near Bryson City, N. C.; and (3) that the State of North Carolina would pay $100,000 to the TVA to aid in the purchase of the lands and would build certain roads to connect with the parkway when it should be constructed.

Pursuant to this contract, the TVA proceeded to acquire by purchase more than 38,000 acres of the land—all of the 44,400 acres, except the six tracts involved in these condemnation proceedings

and certain lands, belonging to mining companies, which were excepted from the contract. One of the tracts not acquired but involved in these condemnation proceedings is a fishing and hunting preserve containing 4,500 acres lying at the eastern extremity of the 44,400 acres and adjoining the Great Smoky Mountains National Park. The others, with the exception of the 163-acre tract of the defendant Welch, also lie near the eastern boundary of the 44,400 acres. Welch and one Burns, another of the owners, have renounced all claims on account of the flooding of the road and ask nothing but that they be left alone in the enjoyment of their property.

The Board of Directors of the TVA passed resolutions to the effect that the condemnation of the property involved in these cases is necessary to carry out the purposes of the TVA Act. The position of its counsel in this court is that the courts are bound by the resolutions of the Directors; that the TVA Act imposes upon them the duty of determining what lands are necessary to carry out the provisions of the Act; and that they have determined that the lands here involved are necessary to the completion of the Fontana project "because their removal from private ownership is essential to the settlement of the Authority's legal liability to the State of North Carolina". Defendants, on the other hand, point out that it is conceded that all of the lands in question are far removed from the high-water mark of the reservoir; that no part of the lands and no material located thereon will be used in the construction, operation or maintenance of the Fontana Dam project, and that immediately upon their acquisition the lands are to be conveyed to the Department of the Interior for incorporation in the Great Smoky Mountains National Park. Defendants accordingly argue that the lands are not being acquired for a public use for which the TVA is authorized to condemn private property, but to be used in making settlement of liability for flooding the state highway; that this is not a taking for the statutory project, but a taking in excess of what is needed for that purpose; and that such taking cannot be held a taking for a public use within the authority granted. We think, as did the judge below, that this position is well taken.

206 As pointed out above, the purpose of the creation of the TVA, so far as its relation to the Tennessee River is concerned, was the improvement of navigation and flood control in that river. Any condemnation of lands by it must have relation to this purpose; and we think that the power of condemnation is expressly so limited by the statute. The TVA seeks to spell out an almost unlimited power of condemnation from certain general powers granted it, such as the general power to purchase, lease

and hold such real and personal property as it deems necessary or convenient in the transaction of its business, 16 USCA 831c (f), the general power to institute condemnation proceedings for the acquisition of land, easements and rights of way necessary to carry out the provisions of the Act, 16 USCA 831x, the power to cooperate with federal, state and local agencies in the readjustment of displaced populations, 16 USCA 831c (1), the power to negotiate and conclude contracts for the relocation of properties, enterprises and projects, 16 USCA 831q, and the general provision that the act shall be liberally construed, with provisos that no real estate shall be held except that necessary to carry out projects decided upon and that it shall dispose of other lands which it may acquire, 16 USCA 831dd. The power to acquire real estate for the construction of dams and reservoirs, however, is specifically covered by section 4 (i) of the statute, 16 USCA 831c (i), which is as follows:

"(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation projects, at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the Board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act. * * *."

The lands here in question are certainly not being taken for any of the purposes above enumerated in the statute. Their condemnation can be sustained only if they may be taken by the TVA for use in discharging a liability arising from the taking and flooding of the highway. This, we think, is taking, not for the public use for which the statute gives the right of condemnation, but for a private use, or at most for a public use not authorized by statute, and that the resolution of the Directors as to the necessity of the taking does not affect its character or justify the condemnation.

It is well settled, of course, that, ordinarily, the necessity of a taking for public use is a legislative and not a judicial ques-
207 tion and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts. Rindge Co. v. County of Los Angeles, 262 U. S. 700, 709; Bragg v. Weaver, 251 U. S. 57, 58; Shoemaker v. United States, 147 U. S. 282; 18 Am. Jur. 734, 737. It is equally well settled, however, that "the nature of a use, whether public or private, is ultimately a judicial question." Rindge Co. v. County of Los Angeles, supra, p. 705; City of Cincinnati v. Vester, 271 U. S. 439, 446. Consequently, where property is taken in excess of that required for the authorized public use, the excess to be used for

some other purpose, the courts have power so to declare. Cincinnati v. Vester, 6 Cir. 33 F. 2d 242, 68 A. L. R. 831, and note at 837; affirmed 281 U. S. 439; Warm Springs Irr. Dist. v. Pacific Live Stock Co., 9 Cir. 270 F. 560; Wilton v. St. John's County, 98 Fla. 26, 123 So. 527, 65 A. L. R. 488; Richmond v. Carneal, 129 Va. 388, 106 S. E. 403, 14 A. L. R. 1341, and note at 1350; Salisbury Land & Imp. Co. v. Com., 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N. S.) 1196; Opinion of the Justices, 204 Mass. 607, 91 N. E. 405, 27 L. R. A. (N. S.) 483. The rule is thus stated in 18 Am. Jur. 736, 737:

"It is a general principle that the legislature cannot authorize the taking of property in excess of that required for the public use, such excess to be sold or devoted to private use. The extent of that power is limited by the necessities of the particular public purpose or use for which the land is sought to be condemned. * * * The mere fact that the land may be resold at a profit whereby the expense of opening a street is reduced does not justify the excess taking. The taking of such excess land is not for a public use. Whether the particular use authorized is public is always a question for the judiciary."

In the case at bar, the only land which it was necessary for the TVA to take for the statutory project was the land covered by its reservoir. In taking this it flooded the highway affording access to the lands in question. This it had the right to do and to condemn the highway and any easements over it appurtenant to the lands to which it afforded access. To condemn the lands themselves, however, was excess condemnation, as they were not needed for any purpose authorized by the statute. Their condemnation cannot be justified as a means of satisfying the liability to the state and county for the flooding of the highway, since this is nothing more than taking private property, not for the statutory public use, but to satisfy an obligation incurred in taking property for such use. If a street railway should damage my property by destroying an easement of light and air, it would hardly be contended that this would give it the right to take the property to escape the payment of damages for the destruction of the easement. Nor would the right be any
208 greater because it desired to transfer the property to another in extinguishment of a claim of damages for property taken from him.

What the TVA is proposing to do here cannot be distinguished in principle from what was condemned by the Supreme Court of Appeals of Virginia in the Carneal case, supra, where Mr. Justice Burks, in a noteworthy opinion, reviews the law and the decisions bearing on the matter. In that case the City of Rich-

mond attempted to take portions of city blocks through which a new boulevard ran, although they were not needed for the boulevard itself. The attempted justification for this excess taking was that, by replatting the lots and readjusting their lines and, presumably, selling them to others, the expense of the improvement could be reduced. In City of Cincinnati v. Vester, supra, the Circuit Court of Appeals of the Sixth Circuit condemned an excess taking for a similar purpose. Certainly the condemnation of land to be used in satisfying the state's claim of damages for the flooding of the road cannot be distinguished in principle from these cases which involved the taking of lands to be used in mitigating damages due to the opening or widening of streets. If the TVA, for the purpose of settling a claim for damages, can take land which it does not need for the public project in which it is engaged, no reason suggests itself why the land could not be taken and sold for the purpose of raising funds to satisfy the claim. The right of private property cannot be flouted in this way. As was well said in the case of Bloodgood v. Mohawk & H. River R. Co., 18 Wend. 9, 31 Am. Dec. 313, 356, quoted in the opinion in the Carneal case:

"When we depart from the natural import of the term 'public use,' and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement,' is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. * * *."

The TVA relies upon Brown v. United States, 263 U. S. 78, in which was upheld the condemnation of land for the relocation of a town flooded by the building of a dam and reservoir. The court pointed out that the circumstances of the case were peculiar and that "a method of compensation by substitution would seem to be the best means of making the parties whole" and that the power of condemnation was necessary to "such substitution." The court relied upon Pitznogle v. Western
209 Maryland R. R. Co., 119 Md. 673, in which it was held that a right of way could be taken by condemnation to substitute for another right of way closed as the result of a taking for public use; but the court was careful to distinguish the case from the Opinion of the Justices, supra, and that class of

cases, holding that property may not be condemned and taken in connection with the opening of a street in order that it may be resold for the benefit of the public. Dohany v. Rogers, 281 U. S. 362, is another case holding that a right of way over other lands may be condemned to be furnished in lieu of a right of way taken. These cases go no further than to hold that the right of eminent domain may be exercised to obtain for another the sort of thing that has been taken from him by the exercise of the power. None of them hold that property of a different sort may be taken from others and given to him in satisfaction of his claim for damages. If the TVA here were attempting to exercise the right of eminent domain to obtain a right of way to build a road to take the place of the road flooded, there would be no question of its right. But when it attempts to condemn lands, not for a substitute roadway, but in order that it may convey them to a public park in order to obtain from the state a release of damages for flooding the road, a very different question is presented. No authority is cited which even remotely sustains such exercise of power, and we know of none.

Another case upon which the TVA relies is Old Dominion Land Company v. United States, 4 Cir. 296 F. 20, affirmed 269 U. S. 55, which is cited as approving a taking to save economic loss to the public. In that case, however, public buildings worth more than a million and a half dollars had been erected on land, worth only a fraction of that amount, which was held by the government under lease that was about to expire. This court held that, under the circumstances, condemnation of the land for the purpose of saving the buildings was for a public use. The Supreme Court, in affirming, based its decision on the ground that the courts must accept the purpose of the acquisition of the property as declared in the Act of Congress under which it was condemned. Nothing said in either opinion sustains what the TVA is attempting here.

We have discussed the case so far as though the carrying out of the contract into which the TVA has entered would result in a saving to the public. As a matter of fact the contract obligates the Department of the Interior to build a highway in the park, when public funds are available, at a cost of several millions of dollars, many times what it would cost to pay the damage resulting from the flooding of the old highway. This may be in the public interest, but it certainly constitutes no saving to the public and involves an expenditure of public funds and a condemnation of property for purposes far remote from those for which the TVA was created. North Carolina, if it sees fit, may condemn lands for the purpose of donation to the park. Yarborough v. North Carolina Park Commission, 196 N. C. 284.

145 S. E. 563, 569. And under the Weeks Law they may be condemned by the United States for park or forestry purposes where funds for their payment have been made available. (Albert Hanson Lumber Co. v. United States, 261 U. S. 581, 587; United States v. Southern Power Co., 4 Cir. 31 F. 2d 852, 856. The TVA, however, has no right to condemn them for such purpose; and for the reasons above stated, we do not think that it may do so merely because by so doing it can settle a liability for flooding a highway.

The judgments appealed from will be affirmed.

Affirmed.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5373

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

S. COLUMBUS WELCH, APPELLEE

Appeal from the District Court of the United States for the Western District of North Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

211 On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5374

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

JOHN BURNS ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

May 28, 1945, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts" and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5375, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

212 *Opinion*

Filed July 21, 1945

Note: The opinion appears at page 3a and is, therefore, omitted here.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5374

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

JOHN BURNS ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of North Carolina

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

213 Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5375

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

FRED LOLLIS, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5376, 5377, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

Note: The opinion appears at page 3a and is, therefore, omitted here.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

214 No. 5375

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

FRED LOLLIS, ET AL., APPELLEES

Appeals From the District Court of the United States for the Western District of North Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5376

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ARNOLD E. BRADSHAW, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts" and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5375, 5377, and 5378, before Parker, Soper, and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

Filed July 21, 1945

Note: The opinion appears at page 3a and is, therefore, omitted here.

Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5376

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ARNOLD E. BRADSHAW, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

216 On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5377

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

PHILIP G. RUST, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

April 23, 1945, statement under section 3 of rule 10 is filed.

May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

217 June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5375, 5376, and 5378, before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

Opinion

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Judgment

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United States Circuit Court of Appeals, Fourth Circuit

No. 5377

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

PHILIP G. RUST, ET AL., APPELLEES

Appeal from the District Court of the United States for the Western District of North Carolina

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On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE,
U. S. Circuit Judge.

218 On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit

No. 5378

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

Appeal From the District Court of the United States for the Western District of North Carolina, at Asheville

April 12, 1945, the transcript of record is filed and the cause docketed.

April 16, 1945, the appearance of Thomas J. Griffin, Solicitor; Charles J. McCarthy, Assistant General Counsel, and William C. Fitts, Jr., Special Counsel, Tennessee Valley Authority, is entered for the appellant.

Same day, the appearance of G. L. Jones and Geo. H. Ward is entered for the appellees.

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May 19, 1945, brief and appendix on behalf of the appellant are filed.

June 6, 1945, brief and appendix on behalf of the appellees are filed.

June 12, 1945, motion of appellees to strike from the files that portion of brief of appellant designated "Statement of Facts," and for disciplinary action filed.

Argument of cause

June 19, 1945 (June term, 1945), cause came on to be heard, together with Nos. 5373, 5374, 5375, 5376, and 5377, before Parker, Soper, and Dobie, Circuit Judges, and was argued by counsel and submitted.

219

Opinion

Filed July 21, 1945

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Judgment

Filed and Entered July 21, 1945

United States Circuit Court of Appeals, Fourth Circuit

No. 5378

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, APPELLANT

v.

ABRAHAM COLE HYATT, ET AL., APPELLEES

Appeal from the District Court of the United States For the Western District of North Carolina.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of North Carolina, and was argued by counsel.

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pealed from, in this cause, be, and the same is hereby, affirmed with costs.

JOHN J. PARKER,
Senior Circuit Judge.

MORRIS A. SOPER,
U. S. Circuit Judge.

ARMISTEAD M. DOBIE.
U. S. Circuit Judge.

On another day, to wit, August 21, 1945, the mandate of this Court, in this cause, is issued and transmitted to the District Court of the United States for the Western District of North Carolina, at Asheville, in due form.

220 *Clerk's certificate*

UNITED STATES OF AMERICA, FOURTH CIRCUIT, *ss*:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to brief for appellant; appendix to brief for appellees, and the proceedings in the said Circuit Court of Appeals in the therein entitled causes, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in the said causes, made up in accordance with the direction of the Solicitor General of the United States, for use in the Supreme Court of the United States on applications for writs of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 11th day of October A. D. 1945.

[SEAL] CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.

220—A Supreme Court of the United States

No. 528—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220—B Supreme Court of the United States

No. 529—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220—C Supreme Court of the United States

No. 530—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220—D Supreme Court of the United States

No. 531—October Term, 1945

Order allowing certiorari—Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. JUSTICE JACKSON took no part in the consideration or decision of this application.

220-E Supreme Court of the United States

No. 532—October Term, 1945

Order allowing certiorari

Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

220-F Supreme Court of the United States

No. 533—October Term, 1945

Order allowing certiorari

Filed December 10, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

220-G Supreme Court of the United States

October Term, 1945

Nos. 528–533

Stipulation as to record

Filed December 27, 1945

Subject to this Court's approval, it is hereby stipulated and agreed, by and between the attorneys for the respective parties

hereto, that for the purpose of the hearing on Writs of Certiorari, the printed record shall consist of the printed record on Petition for Writs of Certiorari.

220-H It is further stipulated and agreed that either of the parties hereto may refer in their briefs and argument to the original record filed in the Supreme Court of the United States, which has not been printed.

Dated this 17th day of December 1945.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General,
Counsel for Petitioner.

Dated this 20th day of December 1945.

G. L. Jones,
Geo. H. Ward,
G. L. JONES,
GEORGE H. WARD,
Attorneys for Respondents, Fred Lollis, et al., Arnold E. Bradshaw, et al., Philip G. Rust, et al., and Abraham Cole Hyatt, et al., and John Burns, et al.

Dated this 22nd day of December 1945.

McKinley Edwards,
MCKINLEY EDWARDS,
Attorney for Respondents, S. Columbus Welch.

[File endorsement omitted.]

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